

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
<small>Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.</small>				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 15.Sep.03		3. REPORT TYPE AND DATES COVERED THESIS
4. TITLE AND SUBTITLE "BATTLEFIELD CONTRACTORS: TIME TO FACE THE TOUGH ISSUES"			5. FUNDING NUMBERS	
6. AUTHOR(S) MAJ VERNON REBECCA R				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) THE GEORGE WASHINGTON UNIVERSITY			8. PERFORMING ORGANIZATION REPORT NUMBER  CI02-1284	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT Unlimited distribution In Accordance With AFI 35-205/AFIT Sup 1			12b. DISTRIBUTION CODE	
DISTRIBUTION STATEMENT A Approved for Public Release Distribution Unlimited				
13. ABSTRACT (Maximum 200 words)				
<div style="font-size: 2em; font-weight: bold; margin-top: 10px;">20030923 113</div>				
14. SUBJECT TERMS			15. NUMBER OF PAGES 92	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT		18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

**Battlefield Contractors:  
Time to Face the Tough Issues**

By  
Rebecca Rafferty Vernon  
B.A., May 1992, Saint Anselm College  
J.D., May 1995, New England School of Law

A Thesis submitted to  
The Faculty of

The George Washington University  
Law School  
In partial satisfaction of the requirements  
For the degree of Master of Laws

August 31, 2003

**DISTRIBUTION STATEMENT A**  
Approved for Public Release  
Distribution Unlimited

Thesis Directed by  
Steven L. Schooner  
Associate Professor of Law

*The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.*

## I. Introduction

The battlefield as we know it has changed forever. Freedom and democracy no longer lie solely in military hands. Instead, civilian contractors now fuel our planes, operate our weapons, and feed our troops.<sup>1</sup> The military simply cannot operate without them. Yet, the military is unprepared for the legal minefield created by battlefield contractors.

Defense Secretary William Cohen's infamous statement "We can keep the tooth, but cut the tail"<sup>2</sup> prefaced modern military's unprecedented reliance on civilian contractors. Secretary Cohen sought to streamline the military infrastructure by keeping

---

*The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.*

<sup>1</sup> See discussion *infra* Part II.C.2.

<sup>2</sup> Arnold L. Punaro, Options for the New Administration "Keep the Tooth-Cut the Tail," Address to the National Defense University "QDR Symposium" (Nov. 8, 2000) *available at* [http://www.ndu.edu/inss/symposia/jointops00/punaro1\\_files/frame.htm#slide0009.htm](http://www.ndu.edu/inss/symposia/jointops00/punaro1_files/frame.htm#slide0009.htm). Secretary Cohen first stated the philosophy in 1997.

We can sustain the shooters and reduce the supporters - - we can keep the tooth, but cut the tail . . . [r]ight now there is too much fat in the tail. Our infrastructure is still too large for our force structure today . . . We still do too many things in-house that we can do better and cheaper through outsourcing . . . across the board, we've got to streamline, downsize and buy more off the shelf . . . We need to cut the fat from defense not just to save money but also to make the Department every bit as flexible and responsive as the troops we support.

*Id.* Throughout military history "the teeth" described the front line, while "the tail" described the support behind it. Laurie Goering, *Support Convoys Face Perilous Trek to Front*, CHICAGO TRIBUNE, Mar. 5, 2003 at 1.

the “shooters” and reducing the “supporters.”<sup>3</sup> That effort continues today, as civilian companies perform an ever-growing portion of tasks originally performed by uniformed personnel.

The military has contracted with civilian companies for hundreds of years.<sup>4</sup> Originally, contractors provided primarily supplies and transportation. During the last two decades, however, the United States military has come to rely on civilian contractors for various types of logistical and operational support. Civilian contractors increasingly perform tasks such as laundry, food, billeting, transportation and trash removal in deployed locations.

The military also relies heavily on civilian contractors to develop, maintain, and often operate, new technology.<sup>5</sup> This technology includes complex weapons, communications, and intelligence systems. As a result, many of these systems could not operate without contractor support. As these systems deploy, the contract support accompanies it.

Despite increased contractor presence on the battlefield, the Department of Defense (DoD) failed to issue comprehensive guidance. Some critics fear DoD does not understand the seriousness of the issues. In late 2002, the General Accounting Office

---

<sup>3</sup> Punaro, *supra* note 2. The current administration supports the tooth to tail philosophy. In 2001, Defense Secretary Donald Rumsfeld challenged the military to “wage an all-out campaign to shift the Pentagon’s resources from bureaucracy to battlefield, from tail to tooth.” *In the White House and Around Town*, WHITE HOUSE BULLETIN, Sep. 10, 2001.

<sup>4</sup> The history of civilian contractors is discussed *infra* Part II.A.

<sup>5</sup> See discussion *infra* Part II.C.2.c.



(GAO) expressed concern that "[n]obody really has their arms around these issues."<sup>6</sup>

Commentators also fear "the Pentagon has failed to come to grips with a number of profound legal and operational problems posed by putting civilians on the battlefield."<sup>7</sup>

Private industry, however, remains noticeably silent, perhaps because civilian contractors earn an estimated \$150 billion a year for providing these services.<sup>8</sup>

In a June 2003 report on battlefield contractors, the GAO highlighted several areas requiring significant improvement.<sup>9</sup> The GAO noted DoD's increased reliance on contractors for essential services. The GAO determined DoD is completely unprepared for the legal and operational issues associated with battlefield contractors. Among other things, the GAO cited DoD's lack of planning and inconsistent policy as major areas of concern.

## **II. Overview**

This article explores some major legal and operational issues raised by the integration of contractors into the battlefield.<sup>10</sup> DoD is unprepared for the various

---

<sup>6</sup> Linda Robinson & Douglas Pasternak, *America's Secret Armies*, U.S. NEWS & WORLD REPORTS, Nov. 4, 2002, at 38 (quoting Neil Curtin, Director of Defense Capabilities and Management, General Accounting Office).

<sup>7</sup> *Id.* Some experts also fear that the number of contracts far exceeds DoD's ability to police, audit and supervise the contractors. See Mark Fineman, *The World Showdown with Iraq; Privatized Army in Harm's Way*, L.A. TIMES, Jan. 24, 2003 at A1.

<sup>8</sup> Accounts place the number at between \$100 billion and \$200 billion, spread out over fewer than 1,000 companies. Fineman, *supra* note 7.

<sup>9</sup> See GENERAL ACCOUNTING OFFICE, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS (GAO-03-695) (2003) [hereinafter GAO-03-695]. The details of this report will be discussed throughout this article.

<sup>10</sup> This article will focus primarily on the Department of the Army and the Department of the Air Force, as these two services utilize contractors on or around the battlefield with much greater frequency than the other services.

operational issues that may arise in the field. This article challenges DoD to address the tough issues and provide the military departments with uniform guidance. This article proposes DoD restructure its acquisition planning, update its regulations, and increase contractor accountability.

DoD policy must also be updated to adequately address the international law implications of contractor support. DoD policy currently holds that contractors are neither combatants nor non-combatants and are entitled to prisoner of war treatment. This article suggests the DoD position is flawed with regard to certain types of contractors. Many contractors take direct part in hostilities and act more like combatants than civilians. DoD policy fails to protect these contractors from unnecessary harm and international prosecution.

This article will not address all the legal and operational issues raised by battlefield contractors. DoD has a variety of issues, beyond the scope of this article, that must be resolved. Examples include the status of contractors under host nation law, contractors' potential negligence liability under foreign law, and the adequacy of health and death benefits available to deployed contract employees.

This article begins by briefly describing the history of civilian contractors on the battlefield. This history illustrates how current contractor use differs from historical uses. This change in usage generates complex legal and operational issues. Next, the article examines the factors behind DoD's increased reliance on civilian contractors. These factors illustrate how contractors have become essential to the military's success in battle, as well as how difficult it would be to discontinue their use.

The article then describes the contractor's role in military operations worldwide. After describing several current operations, this article discusses the types of contractors currently utilized in military operations. It is important to understand the differences between the types of contractors, as each type carries its own set of legal and operational concerns.

The next section addresses two major operational issues raised by the increased reliance on civilian contractors. First, the article explores the command and control issues raised by the field commander's lack of direct control over contractors and their employees. The article then proposes methods for protecting command and control. Second, the article addresses DoD's inability to ensure the continuation of essential services during hostilities. As the military cannot force contractors to remain in a hostile environment, increased reliance on contractors may prove fatal in combat. The section concludes with recommendations for ensuring the continuation of essential services.

Finally, this article examines contractor status under international law. Status dictates whether an individual is a legitimate target for attack and what rights will be afforded upon capture. This article explains and explores the law of armed conflict under the Geneva Conventions and other applicable treaties. This article concludes that contractors are legitimate targets for attack, yet are completely unprepared to protect themselves. Likewise, some contract tasks place employees at risk of being declared unlawful combatants. As unlawful combatants, employees are ineligible for prisoner of war status and may face war crime prosecution. This section concludes by recommending that DoD reevaluate its use of contractors in certain situations, coordinate

with the international community, and perhaps declare certain types of contractors "combatants."

#### **A. Historical Perspective**

Since the earliest documented wars, civilians provided support to troops in battle. The United States was no exception. As early as the Revolutionary War, contract teamsters provided support to General George Washington's army,<sup>11</sup> feeding the cavalry horses<sup>12</sup> and hauling supplies.<sup>13</sup>

Civilian contractors heavily supported the military during World War II and Vietnam. Roughly 1,200 contractor employees were performing construction services on Wake Island when the Japanese attacked.<sup>14</sup> During the Vietnam War, the North Vietnam government used civilians to transport supplies and repair lines of communication.<sup>15</sup> The United States also utilized contractors in Vietnam, with almost 9,000 civilian contractors located in the country.<sup>16</sup> These contractors, among other things, operated electrical plants, performed aircraft maintenance, and supported complex equipment.<sup>17</sup>

---

<sup>11</sup> Joe A. Fortner, *Institutionalizing Contractor Support on the Battlefield*, ARMY LOGISTITIAN, Jul. 2000 at 13.

<sup>12</sup> George Cahlink, *Army of Contractors*, GOVEXEC, Feb 1. 2002 [hereinafter Cahlink I], available at <http://www.govexec.com/features/0202/0202s5.htm>.

<sup>13</sup> Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, Jun. 22, 2003.

<sup>14</sup> Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 248 (2000).

<sup>15</sup> W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 131 (1991).

<sup>16</sup> Davidson, *supra* note 14, at 235.

<sup>17</sup> *Id.*

In the Gulf War, roughly 5,200 contractors supported 500,000 troops, a ratio of 1 to 100.<sup>18</sup> Contractor support increased significantly in the Balkans, where contract employees outnumbered military personnel. Twelve thousand contract employees supported 9,000 troops.<sup>19</sup> Civilian contractors absorbed 10 percent of the \$13.8 billion spent in the Balkans from 1995 to 2000.<sup>20</sup> Increased reliance over the years is attributed to several important factors.

#### **B. Factors Contributing to Increased Reliance**

Several pervasive trends led to the military's increased reliance on civilian contractors. First, military downsizing in the 1990s reduced the active duty force by 30 percent.<sup>21</sup> At the same time, military involvement in peacekeeping and humanitarian missions steadily increased. Second, the federal government sought to make itself "smaller" by outsourcing non-inherently-governmental functions to private industry.<sup>22</sup> The Secretary of Defense encouraged the military departments to use contractors to free up military personnel for combat duties. Third, DoD encouraged the procurement of

---

<sup>18</sup> Cahlink I, *supra* note 12.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Max Boot, *Korean Crisis Reveals U.S. War Flaws*, USA TODAY, Jan. 8, 2003, at 13A.

<sup>22</sup> From fiscal year 2000 to fiscal year 2002, the Department of Defense concluded 570 public-private competitions covering 56,000 jobs, with private contractors winning over 50 percent of the competitions. Seventy-six more competitions were scheduled to conclude in 2003, with over 15,000 jobs affected. *Public-Private Competitions Have Saved DoD \$5 Billion Since FY '00, Official Says*, DEFENSE DAILY, Mar. 27, 2003 at 2. According to studies by the General Accounting Office and the Center for Naval Analysis, the competitions result in an average 30 percent savings, regardless of who wins the competition. *Id.*

complex defense systems under contracts requiring on-going contractor support throughout the systems' lifecycle.

### **1. Military Downsizing**

In the early 1990s, DoD significantly downsized the military departments by reducing their infrastructures, overall budgets, and military and civilian workforces.<sup>23</sup> By 1995, the active duty and reserve components were reduced by 25 percent, cutting a total of 861,000 personnel.<sup>24</sup> Currently, the active duty force is 30 percent lighter than at the end of the Gulf War.<sup>25</sup>

While the military downsized, the number of missions increased. During the past decade, the United States military participated in humanitarian, peacekeeping and military operations in the Balkans, Columbia, Panama, Afghanistan and Iraq. Likewise, current threats in Liberia, North Korea, and Iran increase the need for United States military support.

In the wake of the events of September 11, 2001, the Air Force sought to add 7,000 troops to its force.<sup>26</sup> Defense Secretary Donald Rumsfeld rejected the request,

---

<sup>23</sup> The defense budget decreased from \$403.5 billion in 1986 to \$260 billion in 1997. Captain John R. Withers, *Contracting for Depot-Level Maintenance*, ARMY LOGISTITIAN, Jan.-Feb. 2000, at 38.

<sup>24</sup> *Public-Private Competitions Have Saved DoD \$5 Billion Since FY '00*, Official Says, DEFENSE DAILY, Mar. 27, 2003 at 2.

<sup>25</sup> Boot, *supra* note 21.

<sup>26</sup> George A. Cahlink, *Send in the Contractors*, A.F. MAGAZINE, Jan. 2003 available at [www.afa.org/magazine/Jan2003/0103contract.html](http://www.afa.org/magazine/Jan2003/0103contract.html) [hereinafter Cahlink II]. After September 11, 2001, all of the military departments made similar requests for increased strength, which were all denied. *Id.*

instructing the Air Force to find the needed bodies within its existing force.<sup>27</sup> Secretary Rumsfeld further suggested the Air Force remove military personnel from tasks that could be outsourced to contractors. The military departments have since recognized that, by using contractors whenever possible, they can devote military personnel to severely undermanned career fields.<sup>28</sup>

Military departments also utilize contractors in foreign venues operating under “force caps.” Either Congress or the host nation may limit the number of American forces allowed in the region. The military must then streamline its forces by outsourcing non-combat functions to civilian contractors, who do not count against the cap.<sup>29</sup> One such example is the State Department's counter-drug program in Columbia, where Congress limited troops to 500.<sup>30</sup> Under a State Department funded contract, DynCorp supports the Columbia program with 355 personnel.<sup>31</sup>

---

<sup>27</sup> *Id.*

<sup>28</sup> This philosophy is inconsistent with the theory that contractors be used only on an “as needed basis” to augment the troops. As commanders become desperate for bodies, they may outsource jobs that are truly essential. *See* discussion *infra* Part III.B.3.

<sup>29</sup> DoD and Army policy encourages contractor use to supplement forces operating under force limits. “When military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units.” ARMY FIELD MANUAL NO. 100-21, CONTRACTORS ON THE BATTLEFIELD 1-1 (2000) [hereinafter FM 100-21]. “Using civilian contractors is particularly effective when a military ceiling is placed on the size of a deployed force.” DEP’T OF DEFENSE, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 (2000) [hereinafter JP 4-0].

<sup>30</sup> Juan O. Tamayo, *Pentagon Contractors Playing Vital Military Support Roles*, MIAMI HERALD, Mar. 7, 2003 at 24.

<sup>31</sup> *Id.*

## 2. Outsourcing

Beginning in the mid-1950s, federal government policy required its agencies to procure all commercial goods and services from the private sector, except when “not in the public interest.”<sup>32</sup> The policy was codified in OMB Circular A-76, which required agencies to procure all “non inherently-governmental” goods and services from the private sector.<sup>33</sup> Many agencies, including the Defense Department, were slow to implement the guidance in OMB Circular A-76.

In 1988, the enactment of the Federal Activities Inventory Reform Act (FAIR) forced agencies to comply with OMB Circular A-76.<sup>34</sup> The FAIR Act required agencies to identify government positions that were not “inherently governmental.”<sup>35</sup> If utilizing the private sector proved more economical and efficient, outsourcing was required.

Positions held by military personnel were not immune. The FAIR Act applied to the military departments and required inventories to include all military personnel

---

<sup>32</sup> William A. Roberts III *et al.*, *A-76 Cost Comparisons: Overcoming the Undue Built-In Bias Favoring In-House Performance of Services*, 30 PUB. CONT. L.J. 585, 587 (2001). This article contains an excellent discussion of the cost comparison process.

<sup>33</sup> *Id.* The Bureau of the Budget, an arm of the executive branch, was responsible for issuing the Circular. In 1970, the Office of Management and Budget overtook the Bureau’s responsibilities. *Id.* at 588. The Circular was first issued in 1966, and was revised several times, most recently in 2003. See OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter OMB A-76], available at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_rev2003.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf).

<sup>34</sup> Pub. L. No. 105-270, 112 Stat. 2382 § 2(a) (1998) (codified at 31 U.S.C. § 501).

<sup>35</sup> Agencies were required to identify all federal employee positions, except those considered “inherently governmental.” Agency heads were responsible for determining which positions were “inherently governmental.” FAIR Act § 4a(2); FAIR Act, 64 Fed. Reg., at 33932. For a detailed discussion of the FAIR Act’s impact on the military departments, see Davidson, *supra* note 14, at 252.



performing commercial activities.<sup>36</sup> With few exceptions, functions such as supply, logistics and engineering were subject to outsourcing.<sup>37</sup>

Current DoD policy requires the military departments to utilize commercial support whenever appropriate.<sup>38</sup> Throughout DoD, contractors perform tasks such as aircraft maintenance, base operations, and base supply.<sup>39</sup> As military operations move predominantly overseas, contractors move as well.

While "inherently governmental" functions are not subject to outsourcing, that concept is slowly eroding. Inherently governmental functions are "so intimately related to the public interest as to mandate performance by Government employees."<sup>40</sup> Under previous versions of OMB Circular A-76, those functions were described as "requir[ing] either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government."<sup>41</sup>

---

<sup>36</sup> FAIR Act, 64 Fed. Reg., at 33934.

<sup>37</sup> The FAIR Act exempted the following military positions: those essential to maintaining required military skills; those positions for which an overseas rotation might be required; and those functions involving skills necessary for career progression. FAIR Act, 64 Fed. Reg., at 33932. The DoD Competitive Sourcing Official determines whether the Circular will apply during a time of declared war or military mobilization. OMB A-76, *supra* note 34, at 3.

<sup>38</sup> DEP'T OF DEFENSE, DIRECTIVE 4100.15, COMMERCIAL ACTIVITIES PROGRAM ¶ 4.4 (Mar. 3, 1989). The directive states that it does not apply during a declared war or military mobilization, which appears to be in conflict with the recently issued OMB Circular A-76. *See supra* note 37 and accompanying text.

<sup>39</sup> For a list of OMB A-76 competitions held between 1995 and 1998, *see* GENERAL ACCOUNTING OFFICE, DEFENSE COMPETITIVE SOURCING 26 (GAO/NSIAD-99-44) (1999).

<sup>40</sup> OMB A-76, *supra* note 34, at D-2.

<sup>41</sup> OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 6.e (1999).

The 2003 Circular revision replaced that language with “requir[ing] the exercise of *substantial* discretion in applying government authority and/or in making decisions for the government.”<sup>42</sup> The addition of the word “substantial” and the removal of the reference to “value judgments” considerably narrowed the definition of inherently governmental.<sup>43</sup> Fewer military tasks are now “inherently governmental,” and contractor reliance increases.

### **3. Increase in Cradle to Grave Contracting**

The heightened use of commercial technology also contributed to the increased contractor presence on the battlefield.<sup>44</sup> DoD policy encourages the military departments to secure long-term support for major defense systems.<sup>45</sup> The more technologically advanced the defense system, the more likely a contractor is responsible for long-term support. The number of defense systems using “smart-weapons” capabilities increased dramatically after the Gulf War. Smart-weapons capabilities exist on 70-80 percent of today's weapons, up from 30 percent during the Gulf War.<sup>46</sup>

---

<sup>42</sup> OMB A-76, *supra* note 34, at App. A, ¶ B.1.a (emphasis added).

<sup>43</sup> This narrowing of the “inherently governmental” definition is currently the subject of litigation. The National Treasury Employees Union is challenging the validity of the new definition, alleging it violates the statutory definition in the FAIR Act. Jason Peckenpaugh, *Union Sues Bush Administration Over New Job Competition Rules*, GOV. EXEC., Jun. 19, 2003.

<sup>44</sup> Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003 at E01 (quoting Peter Singer, an expert at the Brookings Institute in Washington, DC).

<sup>45</sup> See DEP'T OF DEFENSE, REGULATION 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (2002).

<sup>46</sup> Patience Wait, *Contractors Support Systems on Front Lines; Field Teams*, GOV. COMP. NEWS, Mar. 24, 2003, at 8.

While the military always depended on the commercial sector for technology development, it only recently came to rely on it for long-term support. Historically, the private sector would research and develop technology and then relinquish it to the military. The contractor was still responsible for warranty repairs, but its obligations under the contract were essentially relieved.

In contrast, most current weapons system contracts extend far beyond technology development. Contractors increasingly are responsible for maintenance, operation and modernization. They are now involved from development to disposal. Contractors must be present during the weapon system's operation, either on a military installation or a battlefield. Many experts believe the military could not function without these contractors.<sup>47</sup>

The military continues to increase its reliance on technology. For the 2003 fiscal year, DoD received \$127 billion for the research, development, and procurement of weapon systems.<sup>48</sup> Funding will increase dramatically over the next six years, with \$182 billion projected for 2009.<sup>49</sup> With such increases, reliance on contractor support on the battlefield will continue to expand.

---

<sup>47</sup> See Bredemeier, *supra* note 44. Peter Singer believes the military is too reliant on private contractors for support. He cites the military's substantial reliance on contractors for logistics support and the maintenance of critical weapons, such as the B-2 stealth bomber, attack helicopters and drone reconnaissance aircraft. *Id.*

<sup>48</sup> GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: DEFENSE ACQUISITIONS, ASSESSMENTS OF MAJOR WEAPONS PROGRAMS 1 (GAO-03-476 ) (2003).

<sup>49</sup> *Id.* The total investment in weapon systems from now through 2009 will exceed \$1 trillion. Some projected programs include: the Missile Defense Agency's land, sea, air, and space defense systems; the Army's Future Combat System; and the Air Force and Navy's Joint Strike Fighter. *Id.*

## C. The Current Role of Contractors in Military Operations

### 1. Current Applications

Contractors currently support military operations throughout the world.

Contractors provide support to the peacekeeping efforts in the Balkans, the counter-drug operations in Columbia, and the operations in Iraq. Contractors also guard and protect Afghan President Hamid Karazi.<sup>50</sup>

The recent war in Iraq highlighted the increased presence of battlefield contractors. During the war build-up, the media publicized the strong presence of contractors in the Middle East.<sup>51</sup> Contractors sent thousands of technical experts to "operate communications systems, repair helicopters, fix weapons systems and link the computers with the troops to command centers."<sup>52</sup> Some experts estimated there would be one contractor for every ten troops.<sup>53</sup>

---

<sup>50</sup> Chris Flores, *More Than Ever, Private Firms Aiding War Effort*, DAILY PRESS, Mar. 30, 2003, at A1. Experts criticize the use of contractors to provide security in other countries. Many feel this service turns contractor employees into mercenaries, an unsavory status under international law. This topic will not be addressed in this article, but for more information see Deborah Avant, *Private Military Training: A Challenge to US Army Professionalism?*, in THE FUTURE OF THE ARMY PROFESSION (Don Snider and Gayle Watkins, eds., McGraw Hill 2002).

<sup>51</sup> See e.g. Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at 1; Nelson D. Schwartz, *The Pentagon's Private Army*, FORTUNE, Mar. 17, 2003, at 100; Linda Robinson & Douglas Pasternak, *America's Secret Armies*, U.S. NEWS & WORLD REPORTS, Nov. 4, 2002, at 38.

<sup>52</sup> Bredemeier, *supra* note 44. Lockheed Martin also provided support to weapons and computer systems in the region. *Id.*

<sup>53</sup> Cahlink II, *supra* note 26.

In May 2003, there were 8,700 contract employees deployed to the Middle East in support of Operation Iraqi Freedom.<sup>54</sup> DynCorp had 1,000 workers providing aircraft maintenance in Kuwait and security in Qatar.<sup>55</sup> Under a 10-year \$550 million contract with Kuwait, Combat Support Systems maintained weapons and vehicles, charted exercises and managed firing ranges at Camp Doha.<sup>56</sup> In addition, Anteon Corporation operated camps in Afghanistan and Kuwait to train troops for military operations on urban terrain.<sup>57</sup> The tasks performed by contractors are diverse, and several different types of contractors are utilized in the field.

## **2. Types of Contractor Support**

DoD utilizes three types of battlefield contractors: theater support contractors, external theater support contractors, and system contractors.<sup>58</sup> All three contractor types carry out at least part of their responsibilities in the theater of operation. The nature of the tasks performed lead to various legal and operational issues.

---

<sup>54</sup> *Civil Service and National Security Personnel Improvement Act: Hearing on H.R. 1836 Before the House Government Reform Committee*, 108th Cong. (1998) (statement of Senator Tom Davis). Senator Davis questioned the lack of federal civilian employees in Iraq. As of May 2003, only 1700 federal civilian employees were deployed, meaning contractors made up 83 percent of the civilian workforce. *Id.*

<sup>55</sup> Bredemeier, *supra* note 44.

<sup>56</sup> Tamayo, *supra* note 30. The contractor has roughly 550 employees positioned at Camp Doha. *Id.*

<sup>57</sup> Wait, *supra* note 46.

<sup>58</sup> JP 4-0, *supra* note 29, at V-2.

**a) Theater Support Contractors**

Theater support contractors generally provide the goods, services and minor construction needed to meet the immediate needs of arriving troops.<sup>59</sup> Generally, this requires contracting with local vendors. These tasks, while often taking place in the battlefield, do not contribute directly to war fighting. Consequently, the legal issues facing these contractors are limited to issues of protection, support, command and control and criminal jurisdiction.

**b) External Theater Support Contractors**

External theater support contractors provide both combat and combat service support. Support is often provided pursuant to contracts established by a contracting headquarters located outside of the theater of operation.<sup>60</sup> As needs arise in a deployed location, these pre-established contracts are tapped to provide a wide variety of support functions such as construction, transportation, mortuary and food services.<sup>61</sup>

**(1) Army's Logistics Civil Augmentation Program**

The most visible external support contract is the Army's Logistics Civil Augmentation Program (LOGCAP).<sup>62</sup> LOGCAP is used to preplan for civilian

---

<sup>59</sup> *Id.* In the Army, this type of support is provided either through prearranged contracts or through contracts awarded from the mission area and is most often associated with "contingency contracting." FM 100-21, *supra* note 29, at 1-3.

<sup>60</sup> JP 4-0, *supra* note 29, at V-2. For additional support, the Army also utilizes contracts by the U.S. Transportation Command (TRANSCOM) for commercial sealift support and the U.S. Army Corps of Engineers for the lease and procurement of real property. FM 100-21, *supra* note 29, at 1-3.

<sup>61</sup> The services also include building roads, airfields, dredging, billeting, prison facilities, utilities, and decontamination. *See* JP 4-0, *supra* note 29, at V-2.

<sup>62</sup> *See generally* DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (1985). The LOGCAP program was established in 1985 and was first used in

augmentation of military operations. LOGCAP is an indefinite-delivery-indefinite-quantity (IDIQ) contract under which the Army can issue orders for supplies and services.<sup>63</sup> LOGCAP was the first IDIQ contract for global logistics support.<sup>64</sup>

This umbrella contract allows the Army to immediately contract for support and services for contingencies around the world.<sup>65</sup> The contractor must be prepared to provide "facilities, supplies, services, maintenance, and transportation."<sup>66</sup> In December 2001, Brown & Root Services, now Halliburton KBR, received the latest LOGCAP contract, providing worldwide combat support for the next 10 years.<sup>67</sup>

---

Southwest Asia in 1988. Peter J. Higgins, *Civilian Augmentation of Joint Operations*, ARMY LOGISTITIAN, Jan.-Feb. 2003, at 14. Under the original LOGCAP contract, the Army could task Brown & Root with "receiving, housing and sustaining 20,000 troops in five base camps for 180 days." At each base camp, Brown & Root was responsible for "billeting, mess halls, food preparation, potable water, sanitation, showers, laundry, transportation, utilities and other logistical support." CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995; LESSONS LEARNED FOR JUDGE ADVOCATES 135 n.448 (1995) [hereinafter HAITI REPORT].

<sup>63</sup> IDIQ contracts are governed by FAR 16.5. Under an IDIQ contract, the government places orders for individual requirements. The government must buy the stated minimum quantity, but has no obligation to buy all its requirements from the contract. See FAR 16.504. For a discussion of IDIQ contracts, see Karen DaPonte Thornton, *Fine Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

<sup>64</sup> Cahlink I, *supra* note 12. Brown & Root earned \$62 million in Somalia for the building and maintenance of Army facilities. In Haiti in 1994, Brown & Root earned \$133 million for providing support to 18,000 troops. *Id.* During its support of the peacekeeping efforts in the former Yugoslavia, Brown & Root employed as many as 20,000 contractors. *Id.*

<sup>65</sup> Higgins, *supra* note 62, at 14.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Recently, the LOGCAP contract was used as a "bridge" contract in Iraq until competition could be held. Brown & Root received five task orders, totaling \$76.8 million, to address issues surrounding the Iraqi oil infrastructure. *Fact Sheet, DoD Mission for Repair and Continuity of Operations of the Iraqi Oil Infrastructure* (May 6,

LOGCAP is a cost-plus-award-fee contract. As a cost reimbursement contract, LOGCAP pays the contractor for all allowable incurred costs.<sup>68</sup> Cost-reimbursement contracts allow for the flexibility needed during uncertain times. Contingency contracting is often the most demanding and complex type of contracting because it normally involves mission essential supplies and services under exigent circumstances. As the costs of contingencies can rarely be accurately estimated, the cost contract reduces the contractor's risk and ensures continued performance under adverse conditions.<sup>69</sup>

LOGCAP is also an incentive type contract. The contractor receives additional profit if certain performance targets are achieved.<sup>70</sup> Under a cost-plus-award-fee (CPAF) contract, the contractor's fee is tied directly to performance and cost control.<sup>71</sup> Thus, the LOGCAP contract is structured to motivate the contractor to perform well and control costs.

---

2003), *available at*

<http://www.acq.osd.mil/dpap/docs/fact%20sheet%20as%20of%2006%20may%2003.doc>.

<sup>68</sup> Cost reimbursement contracts contain an estimated total cost and a cost ceiling that cannot be exceeded without the contracting officer's approval. FAR 16.301-1.

<sup>69</sup> Under the FAR, cost reimbursement contracts can only be utilized when costs cannot be estimated with sufficient accuracy. FAR 16.301-2.

<sup>70</sup> The FAR allows incentive contracts when firm fixed price contracts are not appropriate, and performance can be improved by relating the amount of fee to the quality of performance. *See* FAR 16.401.

<sup>71</sup> CPAF contracts provide for a base fee, and then an additional award based on performance. FAR 16.305. The government evaluates performance based on set criteria, and then makes a unilateral decision as to the award amount. FAR 16.405-2.



## **(2) Air Force Civilian Augmentation Program**

The Air Force Civil Augmentation Program (AFCAP) is similar to LOGCAP.<sup>72</sup> The Air Force places orders on this contract for support during military contingencies.<sup>73</sup> Like LOGCAP, it is a cost-plus-award-fee contract. During the last six years, tasks conducted under the AFCAP contract include building refugee camps in Kosovo, designing electrical engineering at Ali Al Saleem Air Base in Kuwait, and upgrading airfields in Ecuador to support counter-drug operations.<sup>74</sup>

### **c) System Support Contractors**

System support contractors provide the most direct, and perhaps the most controversial, logistical support on the battlefield. These contractors maintain and oftentimes operate defense systems throughout their life-cycle.<sup>75</sup> Defense systems include vehicles, weapons systems, command and control infrastructures, communications, and aircraft.<sup>76</sup> In some instances, the contractor is involved only during the initial fielding of the system. This type of support is known as interim contracted

---

<sup>72</sup> The Air Force awarded the first AFCAP contract to RMS in 1997. The five-year contract generated \$170 million in goods and services. Cahlink I, *supra* note 12. A new eight-year contract was awarded to RMS in 2001 with an estimated value of \$450 million. *Id.* The Navy also utilizes contractor support through the use of its Construction Civil Augmentation Program (CONCAP). See JP 4-0, *supra* note 29, at V-2.

<sup>73</sup> Higgins, *supra* note 62, at 14.

<sup>74</sup> Cahlink II, *supra* note 26.

<sup>75</sup> See JP 4-0, *supra* note 29, at V-1.

<sup>76</sup> Fortner, *supra* note 11, at 13. In the Army, these systems include the command and control infrastructure, Army Battle Command Systems (ABCS), as well as the standard Army management information systems (STAMIS) and communications systems. FM 100-21, *supra* note 29, at 1-3.

support (ICS).<sup>77</sup> Contractor logistic support (CLS), on the other hand, involves long-term support.<sup>78</sup> CLS requires the contractor to work directly on the battlefield, often alongside troops in battle. System support contractors face the most legal issues, as their tasks often involve a direct part in hostilities.

In terms of international law, each type of contractor raises its own unique issues. In terms of operational considerations, however, all battlefield contractors raise similar potential concerns. As discussed below, battlefield contractors raise serious operational concerns.

### **III. Operational Considerations**

One concern is that battlefield contractors may adversely affect military operations. Although battlefield contractors were successful in past military operations, many operational issues are unresolved. Two of these issues will be discussed at length below. First, a field commander's operational control is hindered by his lack of direct authority over the contractor and its employees.<sup>79</sup> Second, military operations may be jeopardized if contractors are unable or unwilling to provide essential services in hostile situations.<sup>80</sup>

#### **A. Command and Control**

Command and control is fundamental to military operations. Command and control is the ability to dictate the movements and actions of personnel and equipment.

---

<sup>77</sup> FM 100-21, *supra* note 29, at 1-3.

<sup>78</sup> *Id.*

<sup>79</sup> See discussion *infra* Part III.A.

<sup>80</sup> See discussion *infra* Part III.B.

In a pure military environment, control is attained through the chain of command and the control of military supplies and equipment. Command and control is hindered when the equipment and personnel belong to the contractor.

## **1. Control Over the Contract**

### **a) Limited Control**

Field commanders exert no direct control over contractors. Battlefield contractors are present because of a contractual relationship. The contract's terms and conditions govern the responsibilities and relationships of the parties. As such, contract authority rests with the contracting officer, not the commander.

The contracting officer is the only designated authority for awarding and administering the contract.<sup>81</sup> Although the contracting officer can delegate some authority, he generally retains the authority to modify the contract's terms and conditions.<sup>82</sup> Field commanders are not authorized to direct the actions of the contractor and must work all issues through the contracting officer.<sup>83</sup>

Commanders are unaccustomed to this lack of control. Commanders rely on their ability to control all personnel and equipment in the theater of operation. This control

---

<sup>81</sup> See 48 C.F.R. § 1.601 (2003). The selection criteria for contracting officers are enumerated at 48 C.F.R. § 1.603-2 (2003). Contract authority also rests with a small number of high level officials who, by virtue of their positions, are considered "designated contracting officers." 48 C.F.R. § 1.601 (2003). The term "contracting officer" is defined in the FAR as a person with authority to "enter into, administer, and/or terminate contracts and make related determinations and findings." 48 C.F.R. § 2.101 (2003).

<sup>82</sup> Contracting officer's representatives lack authority to sign contracts or modifications. John Cibinic Jr. & Ralph C. Nash, Jr., *FORMATION OF GOVERNMENT CONTRACTS* 90 (3d ed. 1998) (citing *Essen Mall Properties v. United States*, 21 CL. CT. 430 (1990)).

<sup>83</sup> See discussion *infra* Part III.A.1.

allows them the flexibility to adapt to changing conditions. While military operations can be planned, well-prepared plans are still subject to rapid and tremendous change.

Unfortunately, commanders lose flexibility when tied to the strict terms of a contract.

The area of logistics provides a powerful example of the dilemma created by the field commander's lack of control. Logistics involves the strategic planning, moving, and maintenance of military forces and, as stated in joint military doctrine, "is the foundation of combat power."<sup>84</sup> Current Army policy states that a combatant commander has directive authority over the logistics within his command.<sup>85</sup> Logistical planning is most successful when the commander is able to "direct logistic actions and resources necessary to meet mission and operational taskings assigned to the command."<sup>86</sup> Direct control is essential.

In the past, commanders had unfettered control over logistics. As contingencies arose, commanders could change the nature and manner of the tasks performed. If forces normally utilized for food service were needed for force protection, the commander could make that change with a simple order. With contractor personnel and equipment, the commander no longer exercises direct control over the logistics of the military operation.

The commander must coordinate all logistical changes through the contracting officer. Unfortunately, the contracting officer is generally not located at the deployed

---

<sup>84</sup> JP 4-0, *supra* note 29, at ix. A nation's ability to be successful in battle is tied directly to that nation's "capability to plan for, gain access to, and deliver forces and materiel to the required points of application across the range of military operations." *Id.* at I-1.

<sup>85</sup> *Id.* at vi.

<sup>86</sup> *Id.* at II-5.

location.<sup>87</sup> It is common for contracting officers to be located at a headquarters office in the United States, yet be responsible for administering several different contracts worldwide. Contracting officers often appoint a representative to oversee daily operations in the field.<sup>88</sup> The representative's utility, however, is limited in that he does not possess the same level of authority as the contracting officer. The representative's authority rarely includes the right to change the contract's terms and conditions.

The Army specifically prohibits contracting officer representatives from "making any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract."<sup>89</sup> This prohibition virtually strips the representative of the ability to resolve contract issues in the field. Instead, the contracting officer representative may only act as a liaison between the commander and the contracting officer.<sup>90</sup>

Commanders must work battle plan changes through the bureaucratic contracting process. The Army's handbook on obtaining and using contractors states that the contracting officer's primary focus should be on "requesting and/or receiving the support

---

<sup>87</sup> *Id.* at V-2.

<sup>88</sup> Contracting officer's representatives are often unit personnel who already possess "functional area oversight responsibilities." FM 100-21, *supra* note 29, at 1-8. This preexisting knowledge of the function and the unit provide a solid foundation upon which to act as a liaison between the unit in the field and the contracting officer.

<sup>89</sup> ARMY MATERIAL COMMAND, PAMPHLET NO. 715-18, AMC CONTRACTOR DEPLOYMENT GUIDE FOR CONTRACTING OFFICERS, 42-3 (July 1996) [hereinafter AMC PAMPHLET].

<sup>90</sup> Army policy requires that the COR have "direct communications to the contracting officer." DEP'T OF THE ARMY, REGULATION NO. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 10 (Oct. 1999) [hereinafter AR 715-9].

services dictated by the needs of the combatant commander's plan."<sup>91</sup> This oversimplifies the process involved in implementing a commander's battle plan.

Several steps must occur before a contract's terms and conditions are changed. First, the contracting officer's representative must forward the issue to the contracting officer, a person far removed from the hostile environment and detached from the exigency of the circumstances.<sup>92</sup> The contracting officer's representative must then convince the contracting officer of the change's necessity.<sup>93</sup> The contracting officer is responsible for the funding implications of the new commitment and may hesitate to agree.<sup>94</sup> In a true armed conflict setting, the contracting officer is unlikely to second-guess the commander. In a less hostile environment, however, the contracting officer may disagree with the commander, thereby substituting his judgment for the commander's.

**b) Commanders Suffer From Limited Knowledge**

Commanders are often unaware of the convoluted process until situations arise in the field. The commander may assume he has authority to direct changes and consequently do so without the contracting officer's knowledge. The Commander will be concerned with the mission, not the fiscal law constraints. The contractor will likely

---

<sup>91</sup> *Id.* at 14.

<sup>92</sup> See discussion *supra* Part II.C.2.b.

<sup>93</sup> The contracting officer must also determine whether the change is within the "general scope of the contract." See FAR 52.243-2.

<sup>94</sup> This is especially true in light of the GAO's recent criticism of overspending in the Balkans. See generally GENERAL ACCOUNTING OFFICE, ARMY SHOULD DO MORE TO CONTROL CONTRACT COSTS IN THE BALKANS 21 (GAO/NSIAD-00-225) (2000) [Hereinafter GAO/NSIAD-00-225].

comply with the commander's changes, as it will increase overall profit. If the change is within the general scope of the contract, the contractor will receive an equitable adjustment for the additional costs.<sup>95</sup> The contracting officer must then decide whether to ratify the commander's actions and assume the additional cost.

Contractors face incredible financial risk when they act based on a commander's direction. Commanders have no authority to bind the government, regardless of the circumstances. In *City of El Centro v. United States*, the United States Court of Appeals for the Federal Circuit reiterated the firm rule that the government is not bound by the actions of unauthorized agents.<sup>96</sup> In *El Centro*, the El Centro Community Hospital sued the government for costs associated with treating illegal aliens brought to the hospital by border patrol agents. When a hospital worker asked one of the agents who would pay for the treatment, the agent stated "me and you" [sic].<sup>97</sup> The hospital argued an implied-in fact-contract existed between the hospital and the government.

The Court denied the hospital's claim finding the agent lacked authority to bind the government.<sup>98</sup> The Court noted that the government could not be held liable for every action taken by its three million civilian employees.<sup>99</sup> Instead, the government is bound only by the actions of specifically authorized agents.

---

<sup>95</sup> See FAR 52.243-2.

<sup>96</sup> 922 F.2d 816 (Fed. Cir. 1990).

<sup>97</sup> *Id.* at 818.

<sup>98</sup> *Id.* at 820.

<sup>99</sup> *Id.* at 819.

Unwary contractors face this harsh result. They may assume that because the direction comes from a commander in the battlefield it transcends traditional rules of authority. The Federal Circuit, however, made clear that contractors bear the risk when they fail to ascertain the bounds of an agent's authority.<sup>100</sup> Consequently, battlefield contractors acting on command direction also assume the risk that they may not receive payment for actions outside the contract's terms.

Commanders who are aware of their limitations often underestimate the government's control of the contract. In a 2000 Balkans report, the GAO found most government officials did not understand their role in the Balkans Support Contract.<sup>101</sup> The Balkans Support Contract was a performance-based, cost-reimbursable contract wherein the results were defined, but the contractor decided how to complete the task.<sup>102</sup>

The GAO found that both Army and DoD officials in the field believed they had little control over the contractor's actions because of the contract's performance-based nature.<sup>103</sup> In reality, the contract allowed the government to dictate the details in situations where they felt it was necessary. The GAO cited the government's lack of

---

<sup>100</sup> *Id.* at 820 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)).

<sup>101</sup> GAO/NSIAD-00-225, *supra* note 94, at 21.

<sup>102</sup> Performance-based contracting is defined as "structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirements set forth, in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work." FAR 2.102.

<sup>103</sup> GAO/NSIAD-00-225, *supra* note 94, at 22.



understanding as a major factor in the government's inability to adequately control contract costs.<sup>104</sup>

Commanders are simply not receiving adequate training. While commanders may be familiar with fixed-price contracts, few have experience with cost-reimbursement types. The commander may wrongly assume the contract is fixed-price, or may know it is cost-reimbursable but not understand how it operates. In the Balkans, one commander was shocked to learn the Army was responsible for the additional costs generated by changing the location of newly constructed buildings. The commander mistakenly believed the contract was fixed-price and assumed the contractor would bear the cost of changes.<sup>105</sup> Contracting officers in those situations must then scramble to find additional funds, often at the expense of other projects.

**c) Proposed Solutions**

**(1) Education and Training**

DoD must train commanders on the basics of government contracting. Detailed training is not required, but commanders must be familiar with contracts operating in their theater of operation. Training must include a working knowledge of the rules of administration, as well as familiarity with contract types.

DoD currently fails to ensure commanders receive adequate training. In 1997, the GAO found commanders in Bosnia were not adequately trained to use the relevant

---

<sup>104</sup> *Id.* at 21.

<sup>105</sup> Interview with Col (Ret) Harry L. Dorsey, National Defense University, Ft. McNair, in Washington, D.C (June 3, 2003). Colonel Dorsey served as one of the primary legal advisors for the Army during Operation Joint Endeavor in Hungary.

support contract.<sup>106</sup> Three years later, the GAO found lack of training remained a continuing problem.<sup>107</sup> In June 2003, the GAO again suggested DoD develop training courses for commanders deploying to locations with contractor support.<sup>108</sup>

DoD should require the military departments to train deploying commanders in government contracting. The training should not be integrated into general courses covering a variety of topics. Instead, the training should be stand-alone, so as to emphasize its importance. Instructors knowledgeable in the intricacies of contingency contracting must provide the training.<sup>109</sup> The most effective instructors are those with deployment experience, as history has proven we learn best from others' mistakes.

The training must provide a general overview of contract administration. The roles and limitations of the contracting officer and his representatives must be explained.<sup>110</sup> Commanders must learn their role in the contracting process and the limits on their authority. Commanders should also learn about contracts operating in the deployed location. The training should familiarize commanders with the contract type, the contractor's basic obligations, and the process used to make changes.

---

<sup>106</sup> GAO/NSIAD-00-225, *supra* note 94, at 24.

<sup>107</sup> *Id.*

<sup>108</sup> GAO-03-695, *supra* note 9, at 38. The GAO suggested DoD create a web-based training course that would include information on the role of the contracting officer and also on the commander's role in the contracting process. While DoD agreed training was necessary, it preferred to evaluate alternative training methods, rather than exclusively relying on web-based training. *Id.* at 49.

<sup>109</sup> The Army Judge Advocate General's School employs a full-time faculty dedicated to teaching government contracts to judge advocates. These instructors could either teach the classes, or be involved in the creation of such classes. For information on The Army Judge Advocate General's School see <http://www.jagcnet.army.mil/TJAGSA>.

<sup>110</sup> See discussion *supra* Part III.A.2.b.

DoD should also issue commanders contracting quick reference guides. While legal support is available in the field, many commanders seek it out only after problems arise. Costly mistakes may be avoided by arming commanders with immediate access to basic concepts.

## **(2) Statement of Agency Needs**

In addition to training, commanders should play a role in contract development. Fewer changes in the field are required if the contract is constructed with operational considerations in mind. At present, DoD does little to ensure operational users are included in contract development.

DoD does not require the combatant element to participate in defining contract requirements. DoD guidance only requires the acquisition planners and operational personnel to “maintain continuous and effective communication.”<sup>111</sup> Part Eleven of the Federal Acquisition Regulation (FAR), which establishes procedures for defining contract requirements, does not require the inclusion of the combatant element.<sup>112</sup> Likewise, the Defense Supplement to the Federal Acquisition Regulation (DFARS) contains no requirement.

The Air Force Supplement to the Federal Acquisition Regulation (AFFARS) is the only agency guidance requiring the combatant element to actively participate in the process. The teams responsible for establishing performance requirements must “include

---

<sup>111</sup> See DEP’T OF DEFENSE, DIRECTIVE 5000.1, THE DEFENSE ACQUISITION SYSTEM ¶ E.1.1.2 (2003).

<sup>112</sup> See FAR 11. These requirements are generally contained in a Statement of Work (SOW).

the warrior.”<sup>113</sup> Commanders provide the team with a representative familiar with the operational environment and the mission plan. DoD should adopt and mandate this approach, as it has proven successful for the Air Force.

DoD should also mandate that all system contracts be written with deployment in mind. Too often, contract planning does not anticipate that the system will deploy to the battlefield.<sup>114</sup> Upon deployment, both the contractor and the government must struggle to sort out the issues.<sup>115</sup> With the current level of deployments, it is safe to assume that all systems will eventually deploy. Contractors and the military will be well-served to write all performance requirements with deployment in mind.

### **(3) Integration**

Finally, commanders need immediate access to contracting personnel authorized to make changes. Authority should not vest in a person far removed from the area of operation. While the incorporation of the contracting officer’s representative into daily operations is a first step, it may not be enough.

One option is to deploy a contracting officer to the area of operation. The contracting officer is then involved in the mission and appreciates the necessity of requested changes. Unfortunately, continuous cuts to the contracting workforce make

---

<sup>113</sup> AFFARS 5311.02.

<sup>114</sup> The GAO found many system support contracts lacked deployment language, either because the parties did not anticipate deployment or because the product was still in the development stage. See GAO-03-695, *supra* note 97, at 26.

<sup>115</sup> When the recent war in Iraq began, attorneys at Lockheed Martin looked to the contract terms for answers to deployment issues. The contracts all had different provisions, and various levels of specificity. As no continuity existed among the various contracts, the attorneys struggled to find the applicable rules. Telephone Interview with Richard Bruning, Roxanne MacGillivray, Dennis Colby & Mike Gillette, Lockheed Martin General Counsel Staff (July 8, 2003) [hereinafter Lockheed Martin Interview].

such a situation impossible.<sup>116</sup> From 1991 to 2001, the federal acquisition workforce decreased by 22 percent.<sup>117</sup> DoD's acquisition workforce experienced the greatest overall decline.<sup>118</sup> Consequently, there are currently not enough contracting officers available to deploy to every location. In addition, contracting officers often administer several contracts operating in different locations.

Another option is to provide contracting officers with operational training. A contracting officer who understands operational considerations may respond quicker to a commander's needs. Contracting officers would benefit from participation in military exercises. A contracting officer who has experienced operational situations first-hand will be more apt to meet commanders' operational needs in the field.<sup>119</sup>

DoD's continued failure to provide seamless, integrated contractual processes will undoubtedly result in cost increases, poor performance, and mission degradation. DoD must place command and control back in the hands of the commander through training, acquisition planning, and integration.

---

<sup>116</sup> In the 1990s alone, the acquisition workforce was cut from 460,516 to 230,556. See OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, *DoD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACTS* (D-2000-088) (2000). For detailed discussion on depletion of the acquisition workforce, see David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 555 (2003).

<sup>117</sup> GENERAL ACCOUNTING OFFICE, *FEDERAL PROCUREMENT SPENDING AND WORKFORCE TRENDS 4* (GAO-03-443) (2003).

<sup>118</sup> *Id.* at 21.

<sup>119</sup> Based on their experiences in Iraq, Lockheed Martin attorneys suggest appointing the line officer in charge to be the contracting officer's representative. Lockheed Martin Interview, *supra* note 115.

## **2. Control over Contract Employees**

### **a) Limits of Command Control**

DoD must also address the combatant commander's lack of control over contract employees. While federal government civilians are required to follow military orders, contract employees are accountable only to their employer.<sup>120</sup> Army guidance "expects" contract employees to comply with commander-issued guidance and obey all general orders. Contract employees, however, are not parties to the contract and have no privity with the military. Thus, the military lacks any authority over their actions.

Commanders are surprised by their lack of control over contractor employees. An After Action Report from peacekeeping efforts in the Balkans stated "the relationship of [contractor employees] to the disciplinary and administrative apparatus of the force often left commanders scratching their heads."<sup>121</sup> Commanders wanted to control the behavior and movement of these civilians, but were unable to do so.

Although no major command and control issues have yet arisen, perhaps it is the result of luck rather than successful planning. For example, during Operation Joint Endeavor, the commander in Hungary feared for the safety of United States citizens living outside the installation. The commander directed all personnel, including

---

<sup>120</sup> Federal government employees are not accountable directly to the chain of command, but are subject to the "chain of supervision." In the Air Force, federal government employees are subject to disciplinary actions up to and including separation from federal services. *See generally* DEP'T OF THE AIR FORCE, INSTRUCTION 36-704, CIVILIAN PERSONNEL, DISCIPLINE AND ADVERSE ACTIONS (1994).

<sup>121</sup> HAITI REPORT, *supra* note 62, at 142-143. The Army committed more than \$96 million to Brown & Root during its support in Haiti. During that time, Brown & Root was "electrifying 23 buildings, installing perimeter lighting and security fencing, constructing base camps, and providing base camp operations, laundry operations, . . . food service operations, . . . maintenance operations, . . . transportation services, and main supply route maintenance." *Id.* at 136 n. 453.

contractors, to move onto the installation.<sup>122</sup> Fortunately the contractors voluntarily complied. Had they resisted, the order was legally unenforceable. Such a result would have frustrated the commander and undermined his authority in the eyes of his forces.

Commanders cannot assume contractors will control their employees.

Contractors only exercise financial, not disciplinary, control over their employees. In the Balkans, Brown & Root employees refused to work during the holiday season. Even after Brown & Root offered pay incentives, the employees were unwilling to work.<sup>123</sup> Brown & Root could not force the contractors to work, thereby illustrating the limitations of disciplinary control rooted in contractual obligations.

Contractors and commanders may also overstep their bounds. In Hungary, contract employees were drinking alcohol in violation of Army command orders. The Army could not take direct action, but instead worked with the contractor to find a solution. The Army built a detention cell to house the drunk employees, and the contractor detained and guarded the employees until they could be evacuated.<sup>124</sup> While effective, this detention could have resulted in legal action, including civil false imprisonment.

Commanders also lack the ability to identify and track contract employees.

Despite Army requirements that contract employees be administratively assigned to

---

<sup>122</sup> DEP'T OF THE ARMY, JOINT ENDEAVOR AFTER ACTION REVIEW CONFERENCE (April 24, 1997) (on file with author) [hereinafter JOINT ENDEAVOR REVIEW].

<sup>123</sup> CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998; LESSONS LEARNED FOR JUDGE ADVOCATES 150 (1998) [hereinafter BALKANS REPORT]. The problem did dissipate over time, but illustrates nonetheless that contract employees cannot be forced to work.

<sup>124</sup> JOINT ENDEAVOR REVIEW, *supra* note 122. Brown & Root placed hand irons on the employees while they were in detention. *Id.*

specific units, commanders rarely can state how many contractors are in the theater of operation. The U.S. Central Command, who was in charge of the operation in Iraq, could not state how many contractors or their employees were in the Persian Gulf Region.<sup>125</sup>

In its 2002 review, the Defense Acquisition Excellence Council (DAEC) noted that improvement was needed to “gain[] visibility as to the number of non-combatants in an area of operation.”<sup>126</sup> DAEC noted that while the military and government civilian employees were tracked by name, the contractor was generally responsible for accounting for its personnel.<sup>127</sup>

Commanders are operationally disadvantaged when they lack knowledge about the number and locations of contract employees. Force protection and evacuation plans are designed according to the number of personnel affected. Without specific knowledge of the contract employees, commanders may underestimate the military manpower necessary to carry out these important tasks.

**b) Lack of Adequate Guidance**

DoD guidance fails to adequately address this lack of control. The DFARS and its clauses do not address the control of contract employees. DoD has also failed to issue guidance to its commanders in the field. Consequently, the military departments create

---

<sup>125</sup> Bredemeier, *supra* note 44.

<sup>126</sup> DEFENSE ACQUISITION EXCELLENCE COUNCIL, MEETING MINUTES (Mar. 18, 2003) (on file with author).

<sup>127</sup> AMC PAMPHLET, *supra* note 89, at 4-1. An exception exists when contractor employees are working “forward,” such as weapon system maintainers. The Army directly tracks these individuals because of the obvious effect on military operations. *Id.* at 4-2. The AMC pamphlet suggests including clauses that allow the contracting officer to require the contractor to report the name and location of employees leaving and entering the area of operation. *Id.* at 4-2.



internal guidance for their commanders, which may be inconsistent with one another. During joint operations, confusion ensues.

Army guidance suggests that commanders use their "indirect" control over the employees.<sup>128</sup> Indirect control is attained by attaching the employees to specific military units and incorporating the commander's orders into employer/employee agreements.<sup>129</sup> Air Force guidance suggests that commanders use available administrative actions.<sup>130</sup>

**c) Limitations of Current Alternatives**

Indirect control and administrative actions are not enough. In Haiti, the commander extended General Order 1 to include contract employees.<sup>131</sup> The order prohibited gambling, possessing privately-owned firearms, consuming alcohol, eating in local Haitian restaurants, and engaging in sexual relations with members of the Haitian populace. Contract employees who violated the order could only be punished by denying them access to the post exchange, barring them from the installation, denying them medical care, or having them removed from the area of operations.<sup>132</sup>

Administrative actions have limited utility. In a hostile environment, a commander would not risk contract employees' safety by forcing them off the installation. Likewise, a commander would be reluctant to deny medical care. As

---

<sup>128</sup> AMC PAMPHLET, *supra* note 89, at 3-1.

<sup>129</sup> *Id.* at 3-2.

<sup>130</sup> THE JUDGE ADVOCATE GENERAL'S DEP'T, DEP'T OF THE AIR FORCE, AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR AND SPACE FORCES 431 (2002) [hereinafter AIR FORCE GUIDE].

<sup>131</sup> HAITI REPORT, *supra* note 62, at 143.

<sup>132</sup> *Id.* at 135 n.448. While B&R responded quickly to situations by removing employees and replacing them, some of the subcontractors declined to take such action. *Id.* at 144.

contract employees generally do not receive routine medical care at military treatment facilities, the punishment would only affect emergency situations.<sup>133</sup> It is unlikely a United States citizen, voluntarily located in a dangerous environment, would be denied emergency medical care. No military commander could bear the public scrutiny of such a decision.

Army and Air Force guidance suggest that commanders punish contract employees by limiting the offender's access to facilities and revoking "any special status [he] has as an individual accompanying the force."<sup>134</sup> This status however, is crucial to the international treatment of contract employees and will unlikely be revoked.<sup>135</sup> The contracting officer may also direct the contractor to remove and replace the employee, but only if specifically provided for in the contract.<sup>136</sup>

Commanders also have limited control over criminal actions. Contract employees are subject to criminal action only for major offenses. The Uniform Code of Military Justice only applies to contractor employees during a declared war.<sup>137</sup> With the recent passage of the Military Extraterritorial Justice Act, contractors can now be prosecuted in

---

<sup>133</sup> AMC PAMPHLET, *supra* note 89, at 17-3. Army personnel may only provide medical care to deployed contract personnel as a "last resort" when non-military care is not available. *Id.* at 17-4.

<sup>134</sup> *Id.* at 3-2; AIR FORCE GUIDE, *supra* note 130, at 431.

<sup>135</sup> See discussion *infra* Part V.

<sup>136</sup> AMC PAMPHLET, *supra* note 89, at 3-2. The contracting officer can direct the removal of any employee "whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security or adversely affect relations with the host nation." *Id.*

<sup>137</sup> *United States v. Averette*, 41 C.M.R. 363 (1970) (holding that a civilian employee could not be tried by court-martial during the Vietnam conflict because it was not a declared war).

the United States for offenses occurring while deployed.<sup>138</sup> Persons accompanying the armed forces can be charged, but only if the offense would be a felony in the United States.<sup>139</sup> Unfortunately, this law does little to help commanders enforce orders and directions, as such failures would not constitute felonies under United States law.

**d) Proposed Solutions**

**(1) Increase Contractor Accountability**

Contractors are in the best position to control their employees. As such, they should be accountable for their employees' actions. If contractors suffer financial losses when employees violate command orders, they are more apt to ensure compliance.

First, contractors must be liable for increased costs resulting from an employee's failure to follow command orders. The military must notify the contractor that deductive changes will be taken for additional costs created by employee misconduct. In addition, contractors must be liable for costs associated with replacing belligerent employees. This would include transportation costs, as well as all additional costs resulting from the temporary loss of that employee.

Second, employee control should be considered when evaluating a contractor's contract performance. Award Fee Plans should include employee control as an

---

<sup>138</sup> Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261-3267 (2000)).

<sup>139</sup> 18 U.S.C. § 3261(a) (2000). For a detailed discussion of the Military Extraterritorial Jurisdiction Act, see Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 A.J.I.L. 446 (2001); Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad-Problem Solved?*, 2000 ARMY LAW 1 (2000).

evaluation factor.<sup>140</sup> At the end of an evaluation period, the government would judge the contractor based on incidents involving its employees. Significant employee issues could cost the contractor a substantial financial loss.

Employee control could also be an evaluation factor for past performance evaluations. With few exceptions, all source selections for negotiated competitive acquisitions over \$100,000 must consider an offeror's past performance.<sup>141</sup> As a result, an offeror with a poor history of employee control would not be competitive.

Tying employee control to profit would prompt contractors to be proactive in ensuring employee control. Contractors would be more selective in choosing which employees to deploy. In addition, employer/employee contracts would likely be more comprehensive, with financial penalties for disobedience.

## **(2) Update DFARS Clauses**

DoD must revise the DFARS by including clauses covering contract employee issues. By addressing the issues within the terms of the contract, liability will be contractually placed with the contractor. While commanders will still lack direct control, the likelihood decreases that situations will arise in the first place.

First, the DFARS should require comprehensive employee/employer contracts. Employees must face financial loss when they fail to follow command orders. The mere loss of employment may not be enough incentive. As such, comprehensive employee/employer contracts can offer lucrative bonuses and damaging penalties.

---

<sup>140</sup> See FAR 16.405-2. The FAR suggests areas to be evaluated under Award Fee Plans, but this list is not exclusive. Agencies retain control to fashion Award Fee Plans to effectively motivate the contractor.

<sup>141</sup> FAR 15.304(c)(3). Past performance need not be evaluated if the contracting officer determines that it is not an appropriate evaluation factor for that contract.

Second, the DFARS should place contractors on notice of their financial liability for employees' actions. The Army currently uses the following clause, which would make an effective model:

The contractor shall ensure that all contractor employees will comply with all guidance, instructions, and general orders applicable to U.S. Armed Forces and DoD civilians . . . . The Contractor shall comply, and shall ensure that all deployed employees and agents comply, with pertinent Department of Army and Department of Defense directives, policies, and procedures, as well as federal statutes, judicial interpretations and international agreements . . . .<sup>142</sup>

The clause should be modified to include references to employer/employee contracts. References to award fee plans and past performance evaluations should also be mentioned where appropriate.

Third, the DFARS should encourage contracting officers to consider employee control as an evaluation factor in award fee plans. It should also suggest that agencies seek this type of information when conducting past performance evaluations. Agencies seeking contract support for a deployment requirement would be keenly interested in the contractor's ability to control its employees.

Finally, the DFARS should require accurate reporting of contract employees in the theater of operation. Commanders must know the exact number of contract employees in order to adequately provide force protection. These numbers are also crucial in preparing for certain contingencies, including evacuation. A new DFARS clause could require monthly reporting, which would force the parties to create an efficient, accurate system for providing the information to the commander.

---

<sup>142</sup> AMC PAMPHLET, *supra* note 89, at 3-4.

DoD must take steps to provide the commander with control over contract employees. By tying discipline directly to financial gain, the military can hopefully avoid disruptive and damaging disciplinary situations.

## **B. Continuation of Essential Services**

DoD views civilian contractors as essential force-multipliers.<sup>143</sup> Contractors augment military support, bridge gaps in support that occur prior to the arrival of military personnel, and replace some functions outright.<sup>144</sup> Under the current "tooth to tail" philosophy, all tasks not requiring military expertise may be outsourced to contractors.

As a result, contractors currently provide essential services to military operations. While contractors are capable of providing the essential services, their use may not be the best operational decision. First, the military loses the in-house ability to maintain and operate its defense systems. Second, the military departments cannot ensure continuation of essential services should the contractor be unwilling or unable to complete the contract.

### **1. Limitations on the Use of Contractors**

Contractors may provide any service this is not inherently governmental.<sup>145</sup>

Federal law also prohibits the military departments from outsourcing "core logistics

---

<sup>143</sup> DoD policy requires the military departments to consider the use of contract resources when assessing mission requirements. The military departments are instructed to use the "most effective mix of the Total Force," which includes "Active, Reserve, civilian, host-nation, and contract resources . . . ." DEP'T OF DEFENSE, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES ¶ 4.1 (Nov. 6, 1990, with changes to Jan. 26, 1996) [hereinafter DODI 3020.37].

<sup>144</sup> FM 100-21, *supra* note 29, at 1-1. The Army views the contractor presence as essential because it "permits the combatant commander to have sufficient support in the theater, while strengthening the joint force's fighting capability."

<sup>145</sup> See discussion *supra* Part III.

capabilities."<sup>146</sup> Core logistics capabilities are defined as "those capabilities that are necessary to maintain and repair the weapon systems and other military equipment."<sup>147</sup>

DoD policy acknowledges that, to remain effective on the battlefield, the military must maintain this core capability.<sup>148</sup> Despite this policy, contractors continue to take over the maintenance and support of sophisticated defense systems. In addition, fewer military members are trained on their use.<sup>149</sup> Consequently, DoD is unprepared for the loss of essential contractor services in the battlefield. DoD has not formulated sufficient alternative plans, nor has it taken proactive steps to ensure contractors remain on the battlefield.<sup>150</sup>

## **2. Current Reliance on Contractors**

As stated earlier, increased reliance on contractors raises important concerns about military readiness. Despite the significant outsourcing, the military emphatically denies allegations that it is too reliant on contractors. Army policy is that "contractors do not permanently replace force structure and the Army retains the military capabilities

---

<sup>146</sup> 10 U.S.C. § 2464 (2002).

<sup>147</sup> 10 U.S.C. § 2464(a)(3) (2002).

<sup>148</sup> 10 U.S.C. § 2464(a)(1) (2002) states:

It is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government-operated . . . to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

<sup>149</sup> See discussion *infra* Part III.B.3.

<sup>150</sup> See discussion *infra* Part III.B.4. See also GAO-03-695, *supra* note 9.

necessary to perform critical battlefield support functions.”<sup>151</sup> Similarly, Air Force policy is to “integrate commercial participation in the Total Force while preserving our core Air Force competencies.”<sup>152</sup>

Experts worry, however, that the military has become too reliant. The Apache helicopter and Palladin artillery are almost completely reliant on contractors for operational and maintenance support.<sup>153</sup> In addition, the Patriot Missile, M1A1 tank, Hunter unmanned aerial vehicle, JSTARS targeting system, and the Spitfire radio rely heavily on contractor support.<sup>154</sup> These defense systems would be rendered non-operational if support were interrupted or ceased. Contractors even acknowledge the vital role they play. One CEO stated “[b]ecause we’re so involved, it’s difficult to extricate us from the process.”<sup>155</sup>

Fortunately, no disruption to essential services has occurred yet. During the Persian Gulf War, a small number of contractors fearful of chemical weapon attacks fled

---

<sup>151</sup> FM 100-21, *supra* note 29, at 1-8. This policy implements the DoD requirement to develop and implement plans to ensure that essential services will continue even if the contractor is unable or unwilling to perform. *Id.* See DODI 3020.37, *supra* note 143.

<sup>152</sup> Memorandum from Lawrence J. Delaney, Acting Secretary of the Air Force, to all MAJCOM-FOA-DRU/CC, Interim Policy Memorandum—Contractors in the Theater (Feb. 8, 2001)[hereinafter Air Force Interim Policy].

<sup>153</sup> Robinson & Pasternak, *supra* note 6, at 38.

<sup>154</sup> *Id.*

<sup>155</sup> Schwartz, *supra* note 51, at 100. The CEO, from DynCorp, believes that although the military could probably fight without them, it would be extremely difficult. DynCorp, a major defense contractor, saw an 18 percent rise in its revenues in 2002 to \$2.3 billion. *Id.*



from an air base in Saudi Arabia.<sup>156</sup> While the contractor's departure did not disrupt the operation, it highlighted potential weaknesses. The contractor decided that financial gain was simply not worth the risk.<sup>157</sup> This highlights the major difference between contractors and military personnel – one is present to serve his country, the other to make a profit.

Contractors refute that such a scenario is possible. Pointing to the voluntary nature of the assignments and the strong presence of retired military employees, contractors deny that such an exodus would occur.<sup>158</sup> One contractor contends that its employees "have as much pride in their country as someone on active duty."<sup>159</sup>

Recently, some senior officials have taken note of the problem. In a June 2002 Memorandum, Claude M. Bolton, Jr., the Assistant Secretary of the Army, stated that program managers should "strive to develop systems that do not require the routine assignment of contractor support personnel in the ground maneuver area forward of the

---

<sup>156</sup> Bredemeier, *supra* note 44. This occurrence was the only documented instances of contractor refusal to perform during the Gulf War.

<sup>157</sup> Lieutenant Commander Stephen P. Ferris & David M. Keithly, *Outsourcing the Sins of War: Contractor Logistics*, MIL. REV., Sept.-Oct. 2001, at 72.

<sup>158</sup> Bredemeier, *supra* note 44.

<sup>159</sup> *Id.* (quoting the executive vice president of ManTech International).

Division Rear."<sup>160</sup> Assistant Secretary Bolton recognized that using contractors in the field increased operational costs and caused complicated legal issues.<sup>161</sup>

The Army now requires programs using contractors in these areas to undergo more rigorous reviews and procedures. Additionally, the systems must require less on-site maintenance by using remote diagnostics, modular "plug and play" components, and software designed to "automatically compensate for detrimental, environmental and operational conditions."<sup>162</sup> The Army hopes these steps will prevent future reliance on contractor support.

In general, DoD is unprepared for the loss of essential contractor services. As discussed in detail below, DoD has not ensured that military personnel retain core logistics skills. DoD has also failed to ensure that the military departments implement the DoD requirements on the continuation of essential services.

### **3. The Loss of Military Proficiency**

In a 2002 report, the GAO noted several problems with current weapon system support.<sup>163</sup> The GAO noted DoD's substantial reliance on contractor support for new

---

<sup>160</sup> Memorandum from Claude M. Bolton, Jr, the Assistant Secretary of the Army, to SAAL-PS, Contractor Support Restrictions (Jun. 11, 2002) (on file with author) [hereinafter Bolton Memo].

<sup>161</sup> *Id.* "Units that depend on contractor personnel for system support and maintenance must allocate precious resources to ensure their security and subsistence, in accordance with Field Manual 3-100.21, Contractors on Battlefield." *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> GENERAL ACCOUNTING OFFICE, REPORT NO. GAO-02-306, DEFENSE LOGISTICS – OPPORTUNITIES TO IMPROVE THE ARMY' AND THE NAVY'S DECISION-MAKING PROCESS FOR WEAPONS SYSTEM SUPPORT (2002)[hereinafter GAO-02-306].

systems and upgrades of old ones.<sup>164</sup> The GAO found that officials in Army and Navy major commands were concerned about their ability to “develop and maintain critical technical skills and knowledge.”<sup>165</sup> Commanders also expressed concern that expanded use of contractors could “create a shortage of adequately trained soldiers and sailors needed to maintain weapons systems during a conflict.”<sup>166</sup> The GAO concluded that DoD failed to address these concerns.

The increased contractor support of weapon systems reduces the knowledge and skill levels of military personnel expected to utilize the weapons in combat. Commanders must replace military logistics personnel with contract employees because the military personnel are desperately needed to complete other tasks.<sup>167</sup> As a result, military personnel do not receive the on-the-job training necessary to maintain logistics skills.<sup>168</sup>

Military members trained to use the equipment are often difficult to keep. Contractors and military members often work together and build strong relationships. Contractors then discover the best and brightest military members and lure them away

---

<sup>164</sup> *Id.* at 13.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The GAO warned that by failing to address this issue, DoD “risk[s] having insufficient numbers of trained personnel when and where they are needed.” *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> This result is contrary to the requirement that military personnel retain those positions needed to maintain proficiency. *See* note 37 and accompanying text. The reliance on contractor support increases the chance that contractor must operate the equipment during hostilities. As discussed in Part IV of this article, contractors who operate weapons systems are arguably combatants under international law.

with better pay and incentives.<sup>169</sup> The loss of skilled military members only increases the military's reliance on contract support. This reliance can degrade military readiness if essential services are lost.

#### **4. Threat to the Continuation of Essential Services**

DoD policy requires the military departments to develop plans and procedures for the continuation of essential services.<sup>170</sup> These plans prevent interruption of essential services during crisis situations. Each military department must create a plan with the contractor providing "reasonable assurance" those essential services will continue. Commanders must prepare contingency plans if they have "reasonable doubts" that the contractor would continue to provide essential services in a crisis situation.<sup>171</sup>

---

<sup>169</sup> GAO-02-306, *supra* note 163, at 13. According to officials at Military Professionals Resources Inc. (MPRI), its employees receive two to three times more pay than military salaries. In addition, they receive benefits such as stock options and 401(k) plans. Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002. When these former military members deploy as civilians, they may also receive a bonus from their employer of up to 50 percent of their salary. Earle Ethridge, *Civilians Put Expertise on the Front Line*, USA TODAY, Dec. 5, 2001, at 8B.

<sup>170</sup> DODI 3020.37, *supra* note 143, ¶ 4.1. The Instruction applies to all branches of the military and is designed to assign responsibility and prescribe procedures to be used when planning for essential services. *Id.* An "essential contractor service" is defined as a "service provided by a firm or an individual under contract to the Department of Defense to support vital systems . . . ." The services are considered essential because "DoD Components may not have military or DoD civilian employees to perform these services immediately . . . [or] . . . [t]he effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately." *Id.* ¶ E2.1.3. A "crisis situation" is defined as "[a]ny emergency so declared by the National Command Authority (NCA) or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international conflict, presenting a serious threat to DoD interests." *Id.* ¶ E2.1.1.

<sup>171</sup> *Id.* ¶ 4.1. The Services are also required to conduct annual assessments of the effect an unexpected loss of contractor support would have on the mission. These results are then to be used to prepare future contingency plans. *Id.* ¶ 5.2.3.

If doubt exists, the commander has three options. First, the commander can transfer the services to military, DoD civilian or host-nation personnel.<sup>172</sup> Second, the commander can prepare a contingency plan to obtain the services from an alternative source.<sup>173</sup> Third, the commander can accept the risk caused by the loss or disruption of essential services.<sup>174</sup>

In 1988, the DoD Inspector General (DoD IG) recommended that military departments identify tasks and services requiring performance by military personnel.<sup>175</sup> The DoD IG termed these services "war-stopper services."<sup>176</sup> These were services that absolutely must continue during hostilities. The DoD IG recognized the importance of

---

<sup>172</sup> *Id.* ¶ 6.4.1. This course of action would require termination of the existing contract. Most likely, the termination would be viewed as one for the convenience of the government. Such a termination would prove costly for the government, as it would be liable for all costs of performance up to the point of termination, as well as a reasonable profit. The Government may also be liable for termination settlement costs.

<sup>173</sup> *Id.* ¶ 6.4.1. This plan must identify alternate sources, such as other military services, DoD civilians, and other contractors. The Chairman of the Joint Chiefs of Staff is required to establish procedures for combatant commanders to use when reviewing and preparing contingency plans. *Id.* ¶ 5.3.1.

<sup>174</sup> *Id.* ¶ 6.4.3. The Instruction requires that someone (it is not clear who bears the responsibility, but we can assume it is the CO) determine, prior to award or modification, whether "an interruption of service would result in an unacceptable risk." *Id.* ¶ 6.5. If the risk is determined to be unacceptable, a contingency plan must be devised and the risk cannot be simply assumed by the combatant commander. *Id.*

<sup>175</sup> DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES i (REP. 91-105) (1991) [HEREINAFTER DOD/IG REPORT].

<sup>176</sup> *Id.* at 9. The IG noted that several different commands within the Services had established internal lists of "wartime essential" services. These lists were not consistent in their criteria, and the IG urged more uniform rules and procedures, preferably at the DoD level. *Id.* at 18.

the continuation of services during hostilities and that the stoppage of such services could cause irreparable harm to the war effort.

In a follow-up audit conducted several years later, the DOD IG found the military departments failed to identify these essential services.<sup>177</sup> It again recommended military departments identify "war-stopper services that should be performed exclusively by military personnel."<sup>178</sup> The military departments again failed to act on the report.

In that same report, the DoD IG concluded that the military departments "could not ensure that emergency-essential services performed by contractors would continue during a crisis or hostile situation."<sup>179</sup> Loss of critical contractor support of complex weapons systems and military equipment "would have a degrading effect on the Armed Forces' capabilities in a protracted war effort."<sup>180</sup> The report cited the lack of contingency planning and the failure to protect contract employees conducting essential tasks.<sup>181</sup>

In 2001, the Air Force eventually issued policy regarding the DoD IG's concerns. The policy required that "uniformed capability to perform essential services . . . be maintained in the event the operational environment precludes the use of contractors."<sup>182</sup>

---

<sup>177</sup> See generally DOD/IG REPORT, *supra* note 175.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at i. The audit was conducted from October 1989 through November 1990 in response to a request from the Army Inspector General. *Id.*

<sup>180</sup> *Id.* at 5.

<sup>181</sup> *Id.* The audit found that of the 67 contracts considered emergency-essential, only seven had contingency plans in place. *Id.* at 6.

<sup>182</sup> Air Force Interim Policy, *supra* note 152, at 2.

In designating services as “essential,” commanders were encouraged to limit those designations to “those truly indispensable to the accomplishment of the mission.”<sup>183</sup> The Air Force also required that “uniformed military augmentation” be available whenever contractors are unable to provide essential services.<sup>184</sup>

In a 2003 report, the GAO found this policy was not being implemented. The report found that, throughout DoD, no essential services were identified, and no alternate plans developed.<sup>185</sup> Commanders simply assumed that things would work themselves out in a crisis situation.

DoD’s continued failure to identify essential services insures that military members will remain untrained, and adequate back-up plans will remain unwritten. The recent GAO report found only one written back-up plan for the continuation of mission essential maintenance.<sup>186</sup> It involved the maintenance of the Air Force’s C21J executive aircraft. Under the plan, the Air Force proposed using Air Force personnel to perform the maintenance in the contractor’s absence. The Air Force, however, had no military personnel trained to perform the maintenance.<sup>187</sup>

---

<sup>183</sup> *Id.* at 2. The policy relies on the fact that “essential” services will be identified in the contract documents, and these support requirements will then be taken into consideration when formulating the operational plan. *Id.*

<sup>184</sup> *Id.* at 2. The policy states “Any determination regarding commercial support must consider the essential services that must be maintained and the risk associated due to possible contractor non-performance. In the event contractors are not able to perform their assigned tasks, uniformed military augmentation must be available and integrated into planning.” *Id.*

<sup>185</sup> GAO-03-695, *supra* note 9, at 11.

<sup>186</sup> *Id.* at 16.

<sup>187</sup> *Id.*

## 5. Options to Ensure Continuation

As noted by the GAO, the first step is to identify essential services. Once the services are identified, military departments can create adequate back-up plans. Contracts must identify all essential services and contracting officers must notify commanders which services are essential.

Next, military departments must train military personnel to provide the essential services. Each contract should require the contractor to train military personnel on the operation and support of complex defense systems. While costly, this requirement is necessary to ensure essential services continue without interruption. This training would guarantee that military departments maintain core logistics skills, as required by federal statute.<sup>188</sup>

DoD must also take steps to bolster contractor reliability. Some suggest contractors will be more reliable when there is a unity of purpose. By integrating contractors into peacetime operations and military exercises, contract employees and military personnel will build a sense of trust and shared objective.<sup>189</sup> This integration results in greater predictability in contractor performance in crisis situations.<sup>190</sup>

---

<sup>188</sup> See discussion *supra* Part II.B.2.

<sup>189</sup> Ferris & Keithly, *supra* note 157, at 72. The author maintains that this integration will "bolster the mutual trust that is needed between the military and its contractors to withstand political or military crises." *Id.* Arguing for the need for long-term relationships, the author points to academic literature supporting the contention that long-term partnerships can "reduce costs and more effectively improve performance than short-term contracts geared to the lowest price." *Id.* The author ultimately proposes a new contract model that would involve the use of long-term contracts for tasks that have unpredictable logistical support because of "technical uncertainty, project complexity or environmental unpredictability," such as complex weapons systems. *Id.*

<sup>190</sup> *Id.* at 72. "Developing mutual trust in realistic peacetime simulations permits the military and its contractors to anticipate each other's reactions under adverse



Contract documents must place contractors and their employees on notice of the risks. Contracts must contain clauses requiring the contractor to acknowledge inherent risks.<sup>191</sup> The Army theorizes that if contractors are adequately informed of the risk, are prepared for the risk and are adequately compensated for taking the risk, they will "more likely than not" remain on the job.<sup>192</sup> Army guidance even offers the option of, in high-risk situations, contractually requiring contractors to hire personnel with military obligations, such as reservists and retirees.<sup>193</sup> The Army would bring the employees onto active duty to ensure continuation of services. Contractors, however, may resist this approach, as it would ultimately eviscerate their contract.

Finally, continued performance must tie directly to financial gain. Experts point out the obvious difference between profit-seeking contractors and civil servants: "profit

---

circumstances." *Id.* The author recognizes that such a level of involvement will inevitably increase the cost of the contractor, as contractors would need to be compensated for participating in simulations and exercises. *Id.*

<sup>191</sup> For an example of these notice clauses, see Major Brian H. Brady, *Notice Provisions for United States Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?* 147 MIL. L. REV. 1 (1995).

<sup>192</sup> AMC PAMPHLET, *supra* note 89, at 7-2. The level of risk involved drives the action taken by the Army. For low risk situations, the Army notifies contractors to expect hardships and be prepared for hostile action, often requiring them to acknowledge such disclosures in writing. *Id.* at 7-3. For medium to high-risk situations, commanders are encouraged to relocate contractors to lower risk areas where they can still successfully complete their tasks without degrading mission effectiveness. *Id.* The commander has the ultimate authority to determine what constitutes a threat and contractor input is only a factor to consider. *Id.* at 7-3 to 7-4. As such, contractors can face contractual breaches if they pull back without command direction.

<sup>193</sup> *Id.* at 7-4. The Pamphlet does recognize the dangers associated with such a requirement, such as the loss of their employees to unrelated mobilizations. *Id.* Proper coordination within mission planning should alleviate some of these concerns, assuming the Army maintains adequate lists of deployed contractors.

seekers, in exchange for a price, deliver a product; while civil servants, in exchange for a wage, agree to accept instructions."<sup>194</sup> Consequently, DoD should require liquidation clauses where appropriate. Although liquidation clauses cannot serve as punishment, they are effective motivators. Award fee plans and past performance evaluations can also consider the contractors' ability to continue services under hostile situations.<sup>195</sup> Army contract guidance suggests that contracting officers "encourage" contractors to structure their pay incentives so that a higher bonus is paid upon completion of a hazardous tour of duty.<sup>196</sup>

Contractors will likely oppose such contract requirements. Contractors are unwilling to accept the performance risks of deployment. For example, under current corporate policy, Raytheon will provide battlefield support only "on a reasonable best effort basis, [and] only with Company personnel who volunteer for the assignment."<sup>197</sup> The policy also requires that certain terms be included in contracts requiring personnel to

---

<sup>194</sup> Deborah Avant, *Selling Security: Post Cold War Private Security Services in Historical Perspective*, Table 1 (Aug. 30, 2001) (unpublished manuscript, on file with author).

<sup>195</sup> See discussion *supra* Part II.2.d.1.

<sup>196</sup> AMC PAMPHLET, *supra* note 89, at 29-1. The Pamphlet suggests the following contract clause: "To ensure continuation of essential services, the contractor shall structure pay of deployed employees such that half the compensation is in the form of a bonus for successfully completing the assigned tour. However, the bonus will not be denied because death or because of government or opposing force action, including government ordered evacuation or captivity by opposing forces." *Id.* "In the event the contractor must pay additional compensation above that contemplated under the contract, to retain or obtain personnel to perform in a theater of operations during a declared contingency, the contractor shall be entitled to an equitable adjustment under this contract . . . ." *Id.*

<sup>197</sup> Raytheon Company Policy, *Contract Performance in a Crisis Situation* (on file with author). It is Raytheon's policy to survey its employees prior to proposal submittal to ensure it has enough volunteers to meet the requirements." *Id.*

deploy in a "crisis situation that could involve hostilities." First, the contract must state that Raytheon is only obliged to use "its reasonable best efforts" to provide personnel to deploy.<sup>198</sup> Second, Raytheon's inability to provide personnel is an excusable delay. And third, because such delays are excusable, Raytheon cannot be terminated for default.<sup>199</sup>

Contractors acknowledge that continued performance during hostile situations may be difficult. The military, however, continues to ignore this possibility. Consequently, contractors remain unaccountable because the contract's terms relieved them of responsibility. With no threat of default termination, contractors lose motivation to ensure the continuation of essential services.

DoD must issue policy to prevent these types of clauses. During competition, the government must notify contractors of the dangers involved with contract performance. Contractors must then decide whether they want to assume the risk of potential hostilities. In most instances, contractors will be highly compensated for remaining during hostilities.

In conclusion, DoD must address the significant operational issues raised by battlefield contractors. Otherwise, the loss of military readiness will jeopardize military operations and place human lives at risk. The issues are complex and require substantial input from all military departments.

#### **IV. International Law Concerns**

This article will now address the international law implications of battlefield contractors. The status of contractors deploying with military forces is not always clear.

---

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

This is problematic because status is crucial in determining an individual's treatment under the law of armed conflict. DoD policy is unclear and does not adequately account for the various situations arising in the field

#### **A. The Law of Armed Conflict**

Battlefield contractors challenge the traditional notions of the laws of war. Armies distinguish between war fighters and innocent civilians when launching attacks and taking prisoners. Civilian contractors, however, do not appear to fit in either category. DoD policy fails to adequately address the international law implications of contractor status, leaving contractor employees at significant risk.

##### **1. History of the Law of Armed Conflict**

International law recognizes that war is an inevitable part of human civilization. Rather than condemn war, international law recognizes it may be inevitable and just in certain circumstances. To minimize human suffering, international law created rules of war. International law refers to these rules as the "Laws of War" or the "Laws of Armed Conflict." Most rules developed through custom and many are now contained in formal treaties and international agreements.<sup>200</sup> Countries generally follow rules not reduced to writing as customary international law.

"Jus in bello" refers to the international law of armed conflict.<sup>201</sup> The law of armed conflict originally developed to instill discipline and control in early armies.<sup>202</sup>

---

<sup>200</sup> See DEP'T OF DEFENSE, DIRECTIVE 5100.77, THE LAW OF WAR PROGRAM ¶ 4 (Dec. 9, 1988) [hereinafter DODD 5100.77].

<sup>201</sup> Asbjorn Eide, *Sovereign Equality Versus the Global Military Structure—Two Competing Approaches to World Order*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 26 (Antonio Cassese ed., Dott. A. Giuffr  Editore 1979).

For example, chivalry contained strict rituals and rules of combat used by knights.<sup>203</sup> As nations became civilized, they strove to protect certain ideals, even during warfare. These ideals included respect for human life, avoidance of unnecessary suffering, and using only such violence as necessary.<sup>204</sup>

**a) Lieber Code**

During the American Civil War, Dr. Francis Lieber, a German immigrant law professor, wrote a pamphlet on the laws of war known as the "Lieber Code." President Lincoln promulgated the Code through the *Instructions for the Government of Armies of the United States in the Field*.<sup>205</sup> Although the Confederates ignored the Code, it became the foundation for many future codes of war.<sup>206</sup> The Lieber Code recognized such principles as the protection of civilians, the humane treatment of prisoners, and the punishment of spies.

---

<sup>202</sup> Bert V.A. Röling, *The Significance of The Laws of War*, CURRENT PROBLEMS OF INTERNATIONAL LAW 143 (Antonio Cassese ed., Dott. A. Giuffr  Editore 1975).

<sup>203</sup> *Id.* Chivalry ended once warfare began to include other classes and types of fighters, who did not feel bound by the traditional rules. *Id.*

<sup>204</sup> Hugo Grotius, one of the fathers of international law, forwarded the notion that "violence, injury that is not necessary for the conduct of war is prohibited; unnecessary suffering, superfluous injury, wanton killing and destruction are forbidden." Röling, *supra* note 202, at 141.

<sup>205</sup> LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, SECOND EDITION 19 (Transnational Publishers, Inc. 2d ed. 1999).

<sup>206</sup> RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 21-23, (Precedent Publishing 1995). The Lieber Code's principles were so similar to the military practices of the time that many countries, including Russia, Spain, Great Britain and France, soon issued similar codes. GREEN, *supra* note 205, at 20.

The Lieber Code influenced one of the first international conventions in Geneva. The Geneva Convention of 1864 became effective one year after the Lieber Code.<sup>207</sup> Entitled *Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field*, the convention focused primarily on the care of the wounded and sick and the protection of medical personnel.<sup>208</sup> It required nations to care for wounded and sick forces, regardless of their nationality.<sup>209</sup>

**b) The Hague Conventions**

In 1899, the First Hague Peace Conference met to establish rules meant to avoid future wars. While the Conference failed in its primary mission, it did codify the rules of war as established through practice and by the Lieber Code.<sup>210</sup> The Conference adopted the *Convention with Respect to the Laws and Customs of War on Land*.<sup>211</sup> This convention covered areas not touched by the Geneva Convention of 1864, such as the treatment of prisoners of war, restrictions on the means and methods of injuring the enemy, and the definition of those considered combatants.

---

<sup>207</sup> The 1864 Convention was comprised of only 10 articles; however, these articles served as the foundation for all subsequent treaties and agreements. JEAN S. PICTET, COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITIONS OF THE WOUNDED AND SICK IN THE ARMED FORCES, INTERNATIONAL RED CROSS, GENEVA, INTRO, 14 (1952) [Hereinafter COMMENTARY, GENEVA I].

<sup>208</sup> FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 9 (Martinus Nijhoff Publishers 1987) [hereinafter KALSHOVEN].

<sup>209</sup> COMMENTARY, GENEVA I, *supra* note 207, at 11.

<sup>210</sup> KALSHOVEN, *supra* note 208, at 13.

<sup>211</sup> The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention].

In 1907, the Second Hague Peace Conference met to again address the issue of world peace. Again failing at its primary mission, the Conference revised the Hague Convention. The changes focused mainly on naval warfare and aerial bombardment.<sup>212</sup> Both Hague Conventions are still relied on today for issues involving the law of armed conflict.

**c) The Geneva Conventions**

Before the Second Hague Peace Conference, several countries met to further codify the law of armed conflict and to expand on those concepts established by the first Hague Convention. They created the Geneva Conventions of 1906, which the parties revised again in 1929.

There are currently four Geneva Conventions, the most recent versions became effective in 1949. The First Geneva Convention is dedicated to the treatment of wounded and sick armed forces.<sup>213</sup> The Second Geneva Convention extends these protections to armed forces at sea.<sup>214</sup> The Third Geneva Convention addresses the treatment of

---

<sup>212</sup> KALSHOVEN, *supra* note 208, at 15.

<sup>213</sup> Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I].

<sup>214</sup> Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II].

prisoners of war.<sup>215</sup> The Fourth Geneva Convention protects the civilian population during wartime.<sup>216</sup>

These Conventions are the foundation of the current law of armed conflict. Parties to the convention must follow its terms, and the international community views most of the concepts as customary international law.

**d) The Additional Protocols**

In 1974, the International Committee of the Red Cross (ICRC) proposed amendments to the 1949 Geneva Conventions to further address the means and methods of warfare.<sup>217</sup> A Conference was held from 1974 to 1977, and in 1977 two protocols were released to supplement the existing Geneva Conventions.<sup>218</sup> The first Protocol dealt with international conflicts, while the Second Protocol focused exclusively on non-international conflicts.

This article will focus exclusively on the First Protocol. The First Protocol is significant because it redefined the term “combatant” and established the rule prohibiting the targeting of civilians and civilian objects.

---

<sup>215</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct 21, 1950)[hereinafter Geneva Convention III].

<sup>216</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950)[hereinafter Geneva Convention IV].

<sup>217</sup> LESLIE C. GREEN, THE LAW OF WAR IN HISTORICAL PERSPECTIVE 64, INTERNATIONAL LAW STUDIES (Michael N. Schmitt, ed., Naval War College Press 1998).

<sup>218</sup> See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.S.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I].



## 2. Application of the Law of Armed Conflict

While the Geneva Conventions provide comprehensive rules on armed conflict, they only apply in certain situations. The Geneva Conventions and its Additional Protocols apply during declared wars or other armed conflicts between two or more parties to the Convention.<sup>219</sup> They also apply during partial or total occupation, even if there is no armed resistance.<sup>220</sup> A party is also bound by the conventions' terms when dealing with non-party enemies that also follow the convention.<sup>221</sup>

The Geneva Conventions do not apply to operations not constituting armed conflict. Peacekeeping and humanitarian operations generally do not constitute armed conflict and the Conventions do not govern them.<sup>222</sup> In these situations, host nation law or status of forces agreements determine the status of contractor employees.<sup>223</sup> United States' policy requires military departments to follow the law of armed conflict during all armed conflict and "unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."<sup>224</sup> While not a

---

<sup>219</sup> Geneva Convention I, *supra* note 213, art. 2; Geneva Convention II *supra* note 214, art.2; Geneva Convention III, *supra* note 215, art. 2.

<sup>220</sup> *Id.* art. 2.

<sup>221</sup> *Id.*

<sup>222</sup> Air Force Interim Policy Memo, *supra* note 152, at 3.

<sup>223</sup> *Id.* The policy notes that "contractors are seldom included" in status of forces agreements.

<sup>224</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01A, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM, ¶ 5a. (Aug. 27, 1999). DoD insures compliance with the laws of armed conflict by requiring each military service to implement a program to educate and prevent violations. *See* DODD 5100.77, *supra* note 200, ¶ 4.2.

party to the Additional Protocols, the United States follows most of its provisions as customary international law.<sup>225</sup>

## **B. Status under International Law**

There are two basic classes of individuals under the law of armed conflict - those that fight, and those that do not. The laws of armed conflict ensure that an individual in one class cannot not enjoy the privileges and protections of both.<sup>226</sup> An individual can face serious consequences under international law when his actions place him somewhere in between.

The law of armed conflict recognizes the difference between war fighters and non-participants. As early as the Lieber Code, a distinction was made between "combatants and non-combatants or unarmed citizens of the hostile government."<sup>227</sup> Combatants were generally organized armies, while non-combatants were private citizens not involved in the hostilities.<sup>228</sup> Throughout the development of the law of armed conflict several different classes have emerged. Most are simply subclasses of the "combatant" or "non-combatant" classes, while others lie somewhere in between. The different classes are discussed at length below.

---

<sup>225</sup> *The United States Position on the Relation of Customary International Law to the 1977 Protocol Additional to the 1949 Geneva Convention*, 2 AM. U.J. INT'L L. & POL. 419 (1987).

<sup>226</sup> M.H.F. Clarke *et al.*, *Combatant and Prisoner of War Status*, in ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 117 (Michael A. Meyer ed., Chameleon Press 1989) (citing THE BRITISH MANUAL OF MILITARY LAW, 1929, HMSO, Amendment No. 12, January 1936, Chapter XIV, para. 17).

<sup>227</sup> HARTIGAN, *supra* note 206, at 20.

<sup>228</sup> Clarke, *supra* note 226, at 107.

## 1. Recognized Classes

### a) Combatants

Combatant status is generally limited to members of organized armed forces.<sup>229</sup>

The generally accepted view, however, is that individuals meeting the criteria enumerated in Article 4(2) of the Third Geneva Convention also qualify as combatants.<sup>230</sup> These individuals must meet the following criteria, they: (1) are under the command of a superior, (2) wear a fixed distinctive sign recognizable at a distance, (3) carry their arms openly, and (4) conduct themselves in accordance with the laws of armed conflict.<sup>231</sup>

Combatants are the only class allowed to wage war.<sup>232</sup> As long as soldiers follow the law of armed conflict, parties cannot prosecute them for the murder of an enemy soldier. Likewise, combatants are legitimate targets for direct attack. A combatant is also entitled to prisoner of war status. The Third Geneva Convention protects combatants as prisoners of war and guarantees their release at the end of hostilities.<sup>233</sup>

---

<sup>229</sup> In Protocol I "armed forces" is defined to include "organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates." Protocol I, *supra* note 218, art. 43(2).

<sup>230</sup> INGRID DETTER, *THE LAW OF WAR, SECOND EDITION* 288 (Cambridge University Press 2d ed. 2000).

<sup>231</sup> Geneva Convention I, *supra* note 213, art. 13; Geneva Convention II, *supra* note 216, art. 13; Geneva Convention III, *supra* note 217, art. 4. These criteria were taken from Article 1 of the Hague Convention on Land Warfare. It states that the "laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling [these criteria]." Hague Convention, *supra* note 211, art. 1.

<sup>232</sup> Protocol I, *supra* note 218, art. 43(2).

<sup>233</sup> See generally Geneva Convention III, *supra* note 215.

**b) Non-Combatants**

The only true “non-combatants” are medical personnel and chaplains.<sup>234</sup>

Although medics and chaplains belong to the armed forces, international law specifically excludes them from combatant status. Some would extend “non-combatant” status to include civilians and combatants who become *hors de combat* by virtue of capture, sickness or injury.<sup>235</sup> The only reference to “non-combatants” in international law, however, relates specifically to medical personnel and chaplains.

Noncombatants cannot engage in hostilities. Unlike combatants, non-combatants have no right to wage war. Noncombatants engaging in hostilities are “illegal combatants” and can be tried, punished, and even put to death for their actions.<sup>236</sup>

**c) Civilians**

The Geneva Conventions afford civilians their own international law status. The Conventions do not specifically define the term “civilian,” but the generally accepted definition is found in Article 3 of the Geneva Conventions. Article 3 requires parties to protect “[p]ersons taking no active part in the hostilities.”<sup>237</sup> Additional Protocol I

---

<sup>234</sup> Protocol I, *supra* note 218, art. 43(2). Under Article 33 of the Third Geneva Convention, medical personnel and chaplains cannot take part in hostilities, cannot be legitimate objects of attack, and must be released upon capture. Geneva Convention III, *supra* note 215.

<sup>235</sup> Major Michael E. Guillory, *Civilianizing the Force: Is the United States Passing the Rubicon?*, 51 A.F. L. REV. 111, 115 (2001). The author includes “civilians accompanying the force” in his list of combatants who are *hors de combat*.

<sup>236</sup> See discussion *infra* Part IV.C.2.

<sup>237</sup> Geneva Convention III, *supra* note 215, art. 3.

implies that individuals are no longer civilians once they take a "direct part in hostilities."<sup>238</sup>

Civilians are a subclass of "non-combatant." Like non-combatants, civilians become "illegal combatants" when they engage in hostilities. Likewise, armed forces cannot directly attack civilians.

**d) Illegal Combatants**

With the exception of combatants, individuals engaging in hostilities are "illegal combatants." Any acts committed in contravention of local law, including murder, are punishable under criminal law.<sup>239</sup> For serious offenses, parties may execute illegal combatants.<sup>240</sup> Parties may also prosecute illegal combatants for war crimes. Under international law, violations of the law of armed conflict are war crimes.<sup>241</sup>

**e) Quasi-Combatants**

Some experts claim contractors fall somewhere in between, as "quasi-combatants." They do not meet the strict definition of combatant, but arguably take part in hostilities. International law shuns the theory of "quasi-combatant" for fear that

---

<sup>238</sup> Protocol I, *supra* note 218, art. 51(3). See discussion *infra* Part IV.C.1.b.

<sup>239</sup> DEP'T OF THE ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD ¶ 80 (1999) [hereinafter FM 100-10-2]. The Army's Field Manual states: "Persons . . . who take up arms and commit hostile acts without having complied with the conditions pre-scribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." *Id.*

<sup>240</sup> "Persons in the foregoing categories who have attempted, committed, or conspired to commit hostile or belligerent acts are subject to the extreme penalty of death because of the danger inherent in their conduct." *Id.* ¶ 82.

<sup>241</sup> *Id.* ¶ 501 (1999). See discussion *infra* Part IV.C.2.

terrorists, guerillas and mercenaries would enjoy the benefits of combatant status.<sup>242</sup>

Other experts find the criteria for determining combatant status too vague, resulting in confusion in application.<sup>243</sup>

## **2. “Civilians Accompanying the Force” Status**

Battlefield contractors fail to fit neatly into a recognized class. While civilians, some contractors engage in actions that support hostilities. DoD addressed this dilemma by creating another class under the law of armed conflict – “civilians accompanying the force.” International law does not discuss this status at length, but treaty sections dealing with prisoner of war status mention it. Analysis of this status reveals significant weakness and limitations.

### **a) Current Military Policy**

DoD policy states that contractors are neither combatants nor non-combatants, but are “civilians accompanying the force.”<sup>244</sup> Article 4 of the Third Geneva provides the basis of this policy because it states that “civilians accompanying the force” are treated as prisoners of war.<sup>245</sup> The Geneva Conventions recognize that persons other than “combatants” are injured, wounded or captured. It enumerates which people are entitled to Geneva Conventions protection, including prisoner of war status. These groups include, among others, members of militias and volunteers corps not considered members

---

<sup>242</sup> Major Lisa Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. REV. 1, 29 n.163 (2001).

<sup>243</sup> See DETTER, *supra* note 230, at 146.

<sup>244</sup> JP 4-0, *supra* note 29, V-6.

<sup>245</sup> *Id.* V-1. See also Geneva III, *supra* note 215, art.4.

of the armed forces, merchant marines, and civilians accompanying the force.<sup>246</sup> DoD doctrine, however, fails to point to any other body of international law recognizing “civilians accompanying the force” status.

DoD policy prohibits contractors from operating in situations where international law might perceive them as combatants.<sup>247</sup> It states “contractor employees cannot lawfully perform military functions.”<sup>248</sup> This doctrine, however, is not enforced or monitored.<sup>249</sup> DoD failed to issue criteria by which military departments could evaluate which functions were “military.” Consequently, each service utilizes its subjective judgment as to whether certain functions are “military.”

DoD must define the term “military function.” Military functions should be defined as those that contribute directly to hostilities and cause actual harm to the enemy.<sup>250</sup> The military uses contractors to refuel airplanes, re-arm jet fighters, and repair A1M1 tanks in the field. Airplane refueling is arguably a military function if it involves mid-air refueling of fighter or bomber aircraft on their way to destroy enemy targets. This refueling contributes directly to hostilities and immediately enables the aircraft to cause actual harm. This same logic applies to re-arming jet fighters. Contract employees

---

<sup>246</sup> Geneva Convention I, *supra* note 213, art. 13; Geneva Convention II, *supra* note 214, art. 13; Geneva Convention III, *supra* note 215, art. 4.

<sup>247</sup> JP 4-0, *supra* note 29, V-1.

<sup>248</sup> JP 4-0, *supra* note 29, V-1. In the Department of Defense publication governing the issue of ID cards, characterizes civilians who accompany the force as “civilian noncombatant personnel.” DEP’T OF DEFENSE, INST. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS ¶ 5.2.1 (1974, changed as of June 5, 1991).

<sup>249</sup> See discussion *supra* Part II.C.2.

<sup>250</sup> See discussion *infra* Part IV.C.1.b.

re-arming aircraft provide armed forces with the immediate ability to harm the enemy. The battlefield repair of an A1M1 tank immediately ensures that military forces can continue to harm the enemy.

DoD's present use of battlefield contractors confuses the traditional notions of "military functions." DoD can enforce its prohibitions on battlefield contractor use only if it adequately defines the parameters. Without guidance, the military departments are free to use their own judgment. As evidenced above, the military departments have not always exercised this judgment properly, which results in tremendous confusion.

The confusion is enhanced when contractors wear military uniforms. DoD policy allows contractors to wear uniforms, provided the commander determines uniforms are necessary.<sup>251</sup> The policy is silent, however, on the precise definition of "uniform." "Uniform" implies the use of a standard garment, but the policy is not clear whether uniforms include military battle dress.

#### **(1) Army**

Army policy takes a slightly different approach. Until a few years ago, the Army referred to contractors as "combatants." In light of DoD policy, the Army modified its language and now refers to contractors as "civilians accompanying the Armed Forces in the theater of operations as authorized members of that force."<sup>252</sup>

---

<sup>251</sup> DODI 3020.37, *supra* note 143, ¶ 5.2.4. Under the Instruction, the Heads of the Components are responsible for "specifically authorizing" appropriate uniforms. *Id.*

<sup>252</sup> AMC PAMPHLET, *supra* note 89, at 11-2.



Army policy states that as long as contract employees carry Geneva Conventions Cards, they are entitled to prisoner of war status.<sup>253</sup> This status is conferred and “demonstrated” by the “possession of a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces).”<sup>254</sup> Recently, however, contractors complained that the military did not always issue these cards to contract employees in the field.<sup>255</sup> This fact is shocking in light of the tremendous significance the military places on the identification cards.

The Army prohibits contractors from wearing battle dress uniforms or similar commercial clothing.<sup>256</sup> The commander may require a uniform appearance, but may not dictate the type of uniform to be worn.<sup>257</sup> Commanders are allowed to provide protective

---

<sup>253</sup> *Id.* at 28-1. “To ensure proper treatment, contractor employees will be provided with an identity card, most notably the Geneva Conventions Identity Card (DD Form 489).” *Id.* A DOD/IG report in 1991 criticized DOD for failing to ensure contractors received the necessary ID cards. DOD/IG REPORT, *supra* note 175, at 8. Subsequently DOD updated DODI 3020.37, which instituted procedures to ensure that the military issued identity cards. *See* DODI 3020.37, *supra* note 143. Under Army guidance, contractors are to be issued a Uniform Services Identification Card, which allows access to government facilities and use of facilities, as well as a Geneva Convention Identity card for Civilians Who Accompany the Armed Forces. AMC PAMPHLET, *supra* note 89, at 16-1. The Uniform Services Identification Card is DD Form 1173. The Geneva Conventions Card is DD Form 489, which “identifies one’s status as an authorized contractor employee accompanying the U.S. Armed Forces.” *Id.*

<sup>254</sup> Memorandum from the Assistant Secretaries of the Army, Policy Memorandum-Contractors on the Battlefield, *available at* [http://usasma.bliss.army.mil/pubs/FM\\_100-10-2/PDF/appf.pdf](http://usasma.bliss.army.mil/pubs/FM_100-10-2/PDF/appf.pdf) (Dec. 12, 1997); FM 100-21, *supra* note 29, at 1-6.

<sup>255</sup> DAEC Conference, *supra* note 126; Interview with Lester Katahara, Counsel for Pratt & Whitney, Hartford CT (July 6, 2003).

<sup>256</sup> AMC PAMPHLET, *supra* note 89, at 18-1.

<sup>257</sup> *Id.*

clothing and equipment, such a Nuclear, Biological, and Chemical (NBC) equipment as necessary.<sup>258</sup>

The Army allows contract employees to carry and use weapons. Commanders may issue weapons for self-defense as long as contract employees comply with the regulations governing training, safety, accountability and storage.<sup>259</sup> Employees must voluntarily accept the weapons, and the company must agree. This policy benefits contract employees because it gives them the ability to defend themselves.<sup>260</sup> It places contractors, however, in an awkward position. They are liable for the actions of their employees if they allow them to arm, yet they do not want to leave them unarmed in hostile territory.

## **(2) Air Force**

Air Force policy posits that civilian contractors are not combatants.<sup>261</sup> Instead, they are “non-combatant persons accompanying the armed forces.”<sup>262</sup> Similar to DoD policy, the Air Force advises commanders not to use contractor personnel in any manner that would jeopardize their status. The Air Force, however, has not performed a detailed analysis of when such status is jeopardized.

---

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 19-1. The AMC pamphlet states that the issuance of a self-defense weapon “does not change the status of . . . contractor personnel under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).” *Id.*

<sup>260</sup> See discussion *infra* Parts IV.C.1.b., IV.E.2.

<sup>261</sup> Air Force Interim Policy Memo, *supra* note 152, at 2.

<sup>262</sup> *Id.* This policy is a slight departure from DoD policy that contractors are not non-combatants.

Unlike the Army, the Air Force does not allow contract employees to carry weapons.<sup>263</sup> The prohibition includes issued weapons and personal weapons. The commander can authorize personal firearms only in very unusual cases.<sup>264</sup> Air Force policy also prohibits contract employees from wearing military garments, including military battle dress uniforms. For compelling reasons contract employees may receive protective gear, as long as distinctive markings clearly demonstrate the wearer is a contractor.<sup>265</sup>

**b) Limitations on “Civilians Accompanying the Force” Status**

Assuming “civilians accompanying the force” status does exist in international law, it encompasses a narrow group of individuals. DoD policy improperly extends “civilian accompanying the force” status to all battlefield contractors. An historical analysis reveals an application far narrower than forwarded by DoD. Consequently, contract employees are currently at significant risk on the battlefield.

Article 3 of the Third Geneva Convention was written to accommodate warfare in 1949 when contractors primarily supported armies by providing supplies. Today’s contractor provides a broader variety of services, well beyond the supply services contemplated in 1949. System support contractors maintain, and often operate, sophisticated weapons and communication systems on the battlefield.<sup>266</sup>

---

<sup>263</sup> *Id.* at 4.

<sup>264</sup> *Id.* As examples, the Air Force cites “protection from bandits or dangerous animals,” but even this use is limited to only those situations where military forces are unable to provide such protection. *Id.*

<sup>265</sup> *Id.* The wear of distinctive insignia is an effort in futility, as the contract employee is likely to be a legitimate target for attack. See discussion *infra* Part V.C.1.b.

<sup>266</sup> See discussion *supra* Part II.C.2.c.

Under the Hague convention, prisoner of war status was given to "individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors."<sup>267</sup> The Third Geneva Convention in 1949 added the word "supply." Parties entitled to prisoner of war status now included "civilian members of aircraft crews, war correspondents, *supply* contractors, members of labour units or of services responsible for the welfare of the armed forces."<sup>268</sup> This addition considerably narrowed contractor eligibility to those performing supply functions.

Military doctrine completely ignores the addition of the word "supply" and its significance. Army guidance intentionally leaves out the word "supply" when citing the Third Geneva Convention. Army guidance quotes the Convention as follows: "[p]ersons who accompany the armed forces without actually being members thereof, such as . . . contractors . . . ." <sup>269</sup> Omission of "supply" gives the Convention a much broader meaning. It extends prisoner of war status to all contractors, clearly exceeding the narrow scope intended by the drafters.

This same Army guidance provides further proof of the narrow scope intended by the drafters. The guidance states that contractors "are generally defined as persons who accompany the armed forces without actually being members thereof and *are responsible for the welfare* of the armed forces."<sup>270</sup> The guidance limits this status to contractors supporting the welfare of the troops. Theater support contractors clearly provide services

---

<sup>267</sup> Hague Convention, *supra* note 211, art. 13.

<sup>268</sup> Geneva Convention I, *supra* note 213, art. 13(4); Geneva Convention II, *supra* note 214, art. 13(4); Geneva Convention III, *supra* note 215, art. 4(4).

<sup>269</sup> FM 100-21, *supra* note 29, at 1-6

<sup>270</sup> *Id.* at 1-6 (emphasis added).

for the welfare of the troops, including food, laundry, and transportation.<sup>271</sup> Conversely, system support contractors do not support the welfare of the troops. Instead, they support the complex defense systems used to wage war.

For years commentators questioned whether certain contractors were combatants. Yet, military policy consistently held that all contractors qualify as “civilians accompanying the force.”<sup>272</sup> Military policy implies that if contractors perform current contracts according to their terms and conditions, they will retain their status.

DoD and Army policy simply lack support in international law. While some theater support contractors qualify as “civilians accompanying the force,” system support contractors clearly exceed those bounds.<sup>273</sup> System support contractors are not supply contractors, nor are they responsible for the welfare of the troops. Their main purpose is to support the weapons, communications, and intelligence systems used to wage war.<sup>274</sup>

Contractors who fall outside the protections of “civilians accompanying the force” face serious consequences under international law. To understand the seriousness of this issue, one must understand the importance of status under international law.

---

<sup>271</sup> See discussion *supra* Part II.C.2.

<sup>272</sup> See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 248 (2000); Major Lisa Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. REV. 1 (2001); Major Michael E. Guillory, *Civilianizing the Force: Is the United States Passing the Rubicon?*, 51 A.F. L. REV. 111, 115 (2001).

<sup>273</sup> See discussion *infra* Part IV.C.1.b.

<sup>274</sup> See discussion *supra* Part II.C.2.c.

### **C. The Importance of Status Under International Law**

Status under the law of armed conflict controls whether an individual is a legitimate object of attack and is entitled to prisoner of war status. DoD's position as to the status of contractors places contract employees in greater danger than if they were allowed combatant status.

#### **1. Contractors as Legitimate Objects of Attack**

While military members know they are subject to direct attack, many contractors feel immune from this danger. The laws of armed conflict generally protect civilians from attack; however, the laws recognize circumstances when civilians may constitute legitimate targets.<sup>275</sup> Consequently, contract employees may be legitimate targets under the law of armed conflict.

Contract employees may be subject to attack in two instances.<sup>276</sup> First, contract employees could lose civilian protection if they engage in hostile activity.<sup>277</sup> Second, they may be legitimate targets because of their proximity to military targets.<sup>278</sup>

Battlefield contractors currently face real danger. In January 2003, Kuwaiti Islamic radicals ambushed two DoD contract employees in Kuwait, killing one and wounding the other.<sup>279</sup> One month later, one contract employee was killed and three

---

<sup>275</sup> AIR FORCE GUIDE, *supra* note 130, at 432.

<sup>276</sup> See discussion *infra* Part IV.C.1.b.

<sup>277</sup> See discussion *infra* Part IV.C.1.b.1.

<sup>278</sup> See discussion *infra* Part IV.C.1.b.2.

<sup>279</sup> Tamayo, *supra* note 30, at 24.

others kidnapped by leftist guerrillas in Columbia.<sup>280</sup> In Iraq, surviving members of Saddam Hussein's former regime attacked Bechtel employees, who were working to restore the oil supply.<sup>281</sup> In May 2003, nine contract employees were killed in a terrorist bombing in Saudi Arabia.<sup>282</sup>

The distinction between combatants and civilians is extremely important. Armed forces must distinguish between civilians and combatants when attacking targets. Likewise, armed forces must distinguish their combatants from the civilian population.

The law of armed conflict protects the civilian population from the dangers of war. As early as the late 1800's, the law of armed conflict recognized this theory. The Lieber Code stated that the "unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."<sup>283</sup> The concept of sparing civilians during wartime continued to develop over time.

With the development of democracy, nations learned to influence a government by abusing and threatening its people.<sup>284</sup> Countries used "coercive warfare" by intentionally targeting civilians to make the war more painful. Examples of coercive

---

<sup>280</sup> *Id.*

<sup>281</sup> Mark Fineman, *After the War; Saboteurs Undermining Efforts in Iraq, US Says*, L.A. TIMES, May 15, 2003, at 1.

<sup>282</sup> Renae Merle, *No Protection Policy For Overseas Contractors; Oversight 'Inconsistent,' Report Says*, WASH. POST, Jun. 26, 2003, at E03.

<sup>283</sup> HARTIGAN, *supra* note 206, at 49.

<sup>284</sup> Röling, *supra* note 202, at 143.

warfare can be seen throughout World War II, as major cities often became the object of attack.<sup>285</sup> Over time, this tactic proved ineffective, as well as costly.<sup>286</sup>

The Hague Convention of 1907 implied that civilians should not be the subject of attack. In Article 25, the convention prohibited the attack or bombardment of "towns, villages, dwellings, or buildings which are undefended . . ."<sup>287</sup> Article 27 required officers to warn the authorities prior to commencing a bombardment.<sup>288</sup> Likewise, Articles 42 through 56 protected the rights of civilians who came under the control of an occupying force.

The Hague Convention protections proved inadequate during the Second World War. The Geneva Conventions were revised in 1949 to regulate the treatment of civilians during hostilities. The Fourth Geneva Convention protected a specified group of civilians from "the arbitrary action on the part of the enemy, and not from the dangers due to military operations themselves."<sup>289</sup> This convention, however, failed to address the issue of specifically targeting civilians.

---

<sup>285</sup> *Id.* The author believes that "coercive warfare" is wholly ineffective, as evidenced by the dropping of the atomic bombs on Hiroshima and Nagasaki. The author points to records of the Japanese Imperial Council that reveal Japan was prepared to discuss surrender before the bombs were dropped. *Id.* at 144. Experts, however, disagree over the legitimacy of these records.

<sup>286</sup> Area bombing in Germany during the Second World War resulted in the deaths of 593,000 German civilians. DETTER, *supra* note 230, at 282-283. Due to the high cost on civilian lives, area bombing was banned under Protocol I in 1977. *Id.*

<sup>287</sup> Hague Convention, *supra* note 211, art. 27.

<sup>288</sup> *Id.*

<sup>289</sup> JEAN S. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Preamble, at 10 (1958) [Hereinafter COMMENTARY, GENEVA IV].



Protocol I was the first codification of the rule protecting civilians from intentional attack.<sup>290</sup> The Protocol also prohibited “indiscriminate attacks” that struck military objectives and civilians without distinction.<sup>291</sup> Commanders planning attacks that could cause incidental loss of civilian life had to weigh that loss against the military advantage to be gained.<sup>292</sup> International law recognizes this theory as the “Rule of Proportionality.”

**a) Contractor Susceptibility to Incidental Attack**

Contract employees may be subject to incidental attack based on their proximity to legitimate targets. The law of armed conflict allows attacks on legitimate “military” objectives. A military target is defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>293</sup> Forces may attack legitimate targets, despite the presence of contract employees. It is easy to imagine how enemy forces might attack a contract employee performing maintenance on a Patriot Missile battery. This example is similar to the accepted practice of targeting of munitions factories in World War II.

Likewise, supply line destruction is extremely effective in attaining a military advantage. Contractors serve as one of the military’s prime sources of supply. While some experts insist that forces must analyze each target individually, others believe they

---

<sup>290</sup> DETTER, *supra* note 230, AT 288. See Protocol I, *supra* note 218, art. 51(2).

<sup>291</sup> Protocol I, *supra* note 218, art. 51(4).

<sup>292</sup> *Id.* art. 51(5).

<sup>293</sup> *Id.* art. 52.

can use certain objective criteria.<sup>294</sup> If an objective test is used, enemies will not consider whether the suppliers are civilian or military.

Contractors also operate facilities, such as weapons depots and motor pools, that constitute legitimate military targets. Armed forces gain significant military advantage when they destroy the munitions and equipment of enemy forces. Under an objective test, the contract employees performing these tasks are fair game for the enemy.

The military must notify battlefield contractors of the inherent risks involved in providing support to deployed troops. Theater support contractors cannot languish under the misconception that they are immune from attack. In addition to educating contractors on the hazards, DoD should properly inform contractors as to the applicable death and injury benefits.<sup>295</sup> Likewise, the military should notify contractors that certain tasks place them at greater risk of incidental attack.

**b) Contractor Susceptibility to Direct Attack**

Enemy forces may *directly* target contract employees in certain circumstances. Civilians lose their protection from direct attack “for such time as they take a direct part in hostilities.”<sup>296</sup> Forces may attack contract employees in the field in two instances. First, if the enemy perceives the employee’s tasks as involving a direct part in hostilities. Second, if the contract employee abandons his civilian status by momentarily engaging in hostile activities.

---

<sup>294</sup> DETTER, *supra* note 230, at 282-283.

<sup>295</sup> For a discussion of these benefits, see James J. McCullough & Abram J. Pafford, *Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations*, BRIEFING PAPERS 1 (2002).

<sup>296</sup> Protocol I, *supra* note 218, art. 51(3).

**(1) Contract Tasks Increase Susceptibility to Attack**

It is unclear at what point a contract employee begins to “engage in hostilities.” Under the Geneva Conventions it begins when the employee “takes an *active* part in hostilities.”<sup>297</sup> Under Protocol I it begins when the employee “takes a *direct* part in hostilities.”<sup>298</sup> The concept of “active participation” implies a greater level of involvement than “direct participation.” Active participation would likely require the actual firing of a weapon. Consequently, the distinction has been the subject of considerable debate.

The Army posits that the “active participation” language of the Geneva Conventions’ applies. This conclusion is based on the fact the United States has not ratified Protocol I.<sup>299</sup> Yet, this theory ignores the fact that the United States follows most of the Protocol as customary international law.<sup>300</sup> The United States specifically objected to portions of the Protocol, but not this new language.<sup>301</sup>

---

<sup>297</sup> Geneva Convention IV, *supra* note 216, art.4 (emphasis added).

<sup>298</sup> Protocol I, *supra* note 218 (emphasis added). While Protocol I specifically addresses the status of journalists in Article 79, it fails to address contractors, or any other civilians accompanying the forces. In the Introductory Note, it states “Article 43 and 44 give a new definition of armed forces and combatants.” Protocol I, *supra* note 218, at Introductory Note.

<sup>299</sup> Memorandum of Law from the Army Office of the Judge Advocate General (May 6, 1999) (on file with author) [hereinafter Army Memo].

<sup>300</sup> Major Richard M. Whitaker, *Civilian Protection Law in Military Operations*, ARMY LAW. 33 (1996) (citing DEPT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS (1992)). The author cites to several instances during Operation Desert Storm where the United States referenced Protocol I in its decisions and determinations. He notes that the United States followed all provisions of the Protocol except those “not codifications of the customary practice of nations.” *Id.*

<sup>301</sup> See Abraham D. Sofaer, *The U.S. Decisions Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT’L L. 784 (1988). The

Consequently, the more appropriate test is whether the contract employee is directly participating in hostilities. ICRC commentary on the Additional Protocols defined "direct participation" as "acts of war, which by their nature or purpose are likely to cause *actual harm* to the personnel and equipment of the enemy armed forces."<sup>302</sup> Any actions taken to promote actual war fighting, as opposed to simply supporting the welfare of the troops, would fall into this category.

Defense systems maintained and operated by contract employees exist to cause actual harm to the enemy. For example, civilian contractors operated the Joint Surveillance and Target Attack Radar System (Joint STARS) during Operation Desert Storm. This aircraft-mounted system detected enemy forces on the ground in the Persian Gulf.<sup>303</sup> Once the radar spotted a target, Joint STARS sent the information to fighter aircraft to destroy the target. This equipment led directly to the destruction of enemy forces.

During the recent war in Iraq, contract employees assisted the Army on the battlefield by maintaining critical defense systems. Seven civilian experts accompanied the 2<sup>nd</sup> Brigade of the 4<sup>th</sup> Infantry Division to maintain several systems, including maneuver, intelligence, logistics, air defense and field artillery.<sup>304</sup> Contract employees

---

United States opposition was based several issues, including the elimination of reprisal for violations of the law of armed conflict.

<sup>302</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, 619 (Y. Sandoz, C. Swinarski, B. Zimmerman, eds. Geneva 1957) (emphasis added).

<sup>303</sup> Peter Grier, *Joint STARS Does its Stuff*, AIR FORCE MAG. (1991).

<sup>304</sup> Bob Dart, *Civilians Keep Army's High-Tech Gear Working in the Desert*, COX NEWS SERVICE, Apr. 18, 2003.

immediately repaired field artillery systems experiencing mechanical difficulties. By enabling defense systems to operate, contract employees caused actual harm to the enemy.

Some commentators agree that civilians who are critical to military success are “civilian in name only.”<sup>305</sup> These individuals place innocent civilians at risk and “greatly damag[e] the credibility of the law of war.”<sup>306</sup> One commentator believes that civilians “working directly towards the military effort” are more combatant than civilian.<sup>307</sup> As an example, he cites to scientists working on radar and rocket science during World War II.<sup>308</sup>

Others claim that a contract employee that “carries a weapon and services a piece of sophisticated military equipment” is a combatant.<sup>309</sup> Another commentator argues that contractors can participate in hostilities as long as they are not “integrated into combat operations.” This integration would occur when the contractor became “an indispensable part of an activity that the activity cannot function without that person’s presence.”<sup>310</sup>

Under any of these analyses, some contract employees are combatants. Army documents even acknowledge that contractors supporting sensitive equipment, such as

---

<sup>305</sup> Hays Parks, *supra* note 15, at 132.

<sup>306</sup> *Id.* at 132.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Davidson, *supra* note 14.

<sup>310</sup> Guillory, *supra* note 235, at 134.

weapons systems, are at risk for intentional attack.<sup>311</sup> The guidance states that “the issue should not be viewed just from the standpoint of the individual, but also how an enemy might view that person, and whether it is likely an attacker could be prosecuted successfully for the attack if captured following the attack.”<sup>312</sup> Although this speaks to incidental attack, the logic can also be applied to direct attack. The most importance analysis is how the enemy views the contract employee’s actions.

Some argue that contractors are no longer legitimate targets once they go home at night.<sup>313</sup> This theory is based on the language “for such time as they take a direct part in hostilities.”<sup>314</sup> Contract employees could take a direct part in hostilities, but still have the protection of civilians. Yet, contract employees often sleep, eat and shower alongside military forces. In this setting, it is unrealistic to assume enemy forces will distinguish between civilians and military forces.

The reality is that contract employees may be subject to direct and incidental attacks in certain circumstances. Merely by performing specified contract tasks, contract employees may cross the line and become combatants. Contract employees may also become combatants when they act outside the contract’s terms.

---

<sup>311</sup> Army Memo, *supra* note 299.

<sup>312</sup> *Id.*

<sup>313</sup> L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, in *ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION* 155 (Michael A. Meyer ed., Chameleon Press 1989).

<sup>314</sup> Protocol I, *supra* note 218, art. 51(3).

## (2) Brief Engagement in Hostilities

DoD policy warns contractors not to act in any manner that would jeopardize their status under the law of armed conflict. This approach displays incredible naivete and ignores the reality of human nature in battle.

Civilians placed in hostile situations will fight to protect themselves and those they care about. In February 1991, Saddam Hussein's army invaded a border town in Saudi Arabia where contract employees were training the Saudi National Guard on the operation of heavy weapons systems.<sup>315</sup> The contract employees accompanied the Saudi National Guard into combat when the attack began. Afterward, a contract employee stated "you will see [contract] employees . . . get into a circumstance where they can't say no . . . Let's face it, they're only human beings."<sup>316</sup> It is unrealistic to assume that contract employees will sit idle during hostile situations such as this. More importantly, it is unrealistic to assume that enemy forces will ignore an idle contract employee.

The Vietnam Conflict provides a perfect example of the dilemma contract employees face. In Vietnam, the North Vietnamese did not distinguish between military forces and "non-combatants." Likewise, "non-combatants" accompanying United States' forces did not sit idle during battle. In the Battle of Ia Drang, Joe Galloway, a reporter accompanying the 7<sup>th</sup> Calvary picked up a rifle and fought along with the soldiers.<sup>317</sup> Joe

---

<sup>315</sup> Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, April 14, 2002.

<sup>316</sup> *Id.* A spokesman for Vinnel stated she was "not aware that that happened, and our company policy is that they not be directly involved. They're hired as advisors only . . . and that's the capacity in which we expect them to act." *Id.*

<sup>317</sup> LT. GEN. HAROLD G. MOORE & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* 176 (HarperPerrenial 1993).

Galloway did not hesitate to defend the soldiers with him. Also, he clearly had no choice, as the North Vietnamese did not distinguish between him and the soldiers.

The likelihood that a contract employee will engage in hostilities increases substantially when that employee has prior military experience. An executive at MPRI once boasted that "We've got more generals per square foot here than in the Pentagon."<sup>318</sup> A person trained to protect himself and his comrades will not shed that training to uphold DoD policy. The reality is that those civilian employees will welcome the chance to join the battle.<sup>319</sup>

In addition, other military policies increase the probability that contractors will engage in hostilities. For example, the Army encourages the development of a "habitual relationship" between military members and contract employees. This relationship results in "a comrade-at-arms kinship, which fosters a cooperative, harmonious work environment and builds confidence in each other's ability to perform."<sup>320</sup> In a hostile situation, men would not abandon the comrade-at-arms kinship. Contract employees are not likely to stand by and watch enemy forces attack their comrades. Instead, contract employees will ignore DoD policy and fight alongside their comrades.

---

<sup>318</sup> *Id.* In 1988, former Army Chief of Staff Carl Vuono and seven other retired generals founded MPRI. Since that time, MPRI has provided military training to dozens of countries, including Croatia, Bosnia, Macedonia and Colombia. While this training is often provided under contracts through the Department of Defense, it is also provided through contracts directly with foreign countries. *Id.* The Defense Department, however, reserves the right to prevent contracts with unsavory countries by denying the necessary licenses. *Id.* For example, in 1998 DoD denied MPRI a license to train the Angolan army. *Id.*

<sup>319</sup> Dart, *supra* note 304.

<sup>320</sup> FM 100-21, *supra* note 29, at 1-10. These relationships are seen by the Army as often "necessary and appropriate," especially in situations where the contractor must be deployed with the unit in order to continue to support a weapon system. *Id.*



Enemy forces, in the heat of battle, will not distinguish between the civilian and the armed forces member. Contract employees, however, are completely unprepared to protect themselves. As evidenced by the capture of the American maintenance division in Iraq, contractors performing similar functions could easily find themselves in combat situations. In these situations, contractors will be confronted by hostile forces who do not care about their "civilians accompanying the force" status.

## **2. Contractors as War Criminals**

Parties may prosecute as war criminals those contract employees engaging in hostilities. Acts of hostility committed by private individuals are punishable as war crimes, not because those actions are contrary to the law of armed conflict, but because it is unlawful for private individuals to wage war.<sup>321</sup>

Contractors may also be punished for dressing as civilians, yet taking part in hostilities. Combatants must distinguish their appearance from that of the civilian population.<sup>322</sup> As evidenced by the recent war in Iraq, both combatants and civilians are placed in danger when combatants dress and appear as civilians. Many Coalition forces lost their lives to hostile forces dressed as civilians. Likewise, Coalition forces were more likely to injure innocent civilians out of fear that the civilians were disguised enemy forces.

---

<sup>321</sup> Clarke, *supra* note 226.

<sup>322</sup> Protocol I, *supra* note 218, art. 44(3). The Protocol also recognizes that there may be instances where a combatant cannot distinguish himself from the civilian population. In those instances, the combatant will retain his combatant status as long as he carries his arms openly during battle and during times when he is visible to enemy forces. *Id.* art. 44 (3)(a)&(b).

The advent of the International Criminal Court further complicates the situation. In 2002, the Rome Statute of the International Criminal Court (ICC) entered into force.<sup>323</sup> The Rome Statute gives the ICC universal jurisdiction over certain offenses, including war crimes. Contract employees could certainly find themselves in front of this court.

Fortunately, the United States has acted to avoid this possibility. Under the Rome Statute, the ICC cannot force a State to surrender an individual to the court if that State has agreed to seek consent from the individual's State first.<sup>324</sup> Using that language, the United States sought bilateral agreements with other countries to ensure reciprocal protection from the statute. In 2002, Congress passed the American Service Protection Act (ASPA).<sup>325</sup> Under this Act, countries not parties to bilateral agreements with the United States face the loss of military assistance. The United States recently suspended aid to 35 countries for failure to enter into such agreements.<sup>326</sup>

The international community may also view contract employees as mercenaries.<sup>327</sup> International law views mercenaries unfavorably and the United Nations

---

<sup>323</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* (1998), *reprinted in* 37 ILM 999 (1998), *corrected through May 8, 2000*, by UN Doc. CN.177.2000.TREATIES-5, *available at* <http://www.un.org/law/icc>.

<sup>324</sup> *Id.* art 98(2).

<sup>325</sup> Pub. L. No. 107-206, Title II, §§ 2001-2015, 116 Stat. 899, *codified at* 22 U.S.C. § 7421 *et. seq.*

<sup>326</sup> Nicholas Kralev, *U.S. Halts Military Aid to 35 Countries*, WASH. TIMES, Jul. 2, 2003 at A1. The suspensions included more than \$47 million in military aid. *Id.*

<sup>327</sup> See Deborah Avant, *Privatizing Military Training*, 7 FOREIGN POLICY IN FOCUS 6 (2002), *available at* <http://www.fpif.org>. For a detailed discussion of mercenaries under international law, see LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, SECOND EDITION 529 (Transnational Publishers, Inc. 2d ed. 1999).

General Assembly has declared them "outlaws."<sup>328</sup> During the 1990s, United States contractors trained militaries in more than 42 countries.<sup>329</sup> Contractors who provide security, training and military services to other countries arguably fit the definition of "mercenaries." This topic goes beyond the scope of this article, but is an issue that must be addressed by DoD.

#### **D. Effects of Current United States Policy on Contractor Status**

The United States recently took several positions adversely affecting the status of contractors under international law. While unrelated to battlefield contractors, these positions directly implicate the same legal theories surrounding contract employee status.

##### **1. "Unlawful Combatant" Status of Taliban**

In response to the brutal terrorist attacks on September 11, 2001, the United States military launched attacks against al-Qaeda and the Taliban regime in Afghanistan. Thousands of al-Qaeda and Taliban men either surrendered or were captured by American forces. The United States subsequently moved the detainees to Guantanamo Bay, Cuba.

In February 2002, President Bush declared that neither the Taliban nor Al-Qaeda detainees were entitled to prisoner of war status.<sup>330</sup> The President determined the Geneva Conventions did not apply to terrorist organizations such as al-Qaeda. He also

---

<sup>328</sup> ABDULQAWI A. YUSUF, *MERCENARIES IN THE LAW OF ARMED CONFLICTS, THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 123 (Antonio Cassese ed. 1979).

<sup>329</sup> Deborah Avant, *Selling Security: Post Cold War Private Security Services in Historical Perspective* (2001) (manuscript on file with author).

<sup>330</sup> See White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002, at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited June 21, 2003).

determined that, while the Geneva Convention covered the Taliban, “[u]nder the terms of the Geneva Convention . . . the Taliban detainees do not qualify as POWs.”<sup>331</sup> The President did not elaborate on the reasons for that determination.

The Bush Administration later clarified that they based the determination on law of armed conflict violations. Specifically, Defense Secretary Donald Rumsfeld stated that the Taliban were unlawful combatants because they tried to look like civilians.<sup>332</sup> He noted that the Taliban “did not wear uniforms, they did not have insignia, [and] they did not carry weapons openly.”<sup>333</sup> This failure to distinguish themselves placed civilians in jeopardy.

While we may believe contract employees are different from the Taliban, some parallels can be drawn. Contract employees are generally not distinguishable from the civilian population. They do not dress in military clothes and often do not wear insignia.<sup>334</sup> In addition, some contract employees carry arms to protect themselves.<sup>335</sup> Assume that, for the reasons discussed in the previous section, another country found that

---

<sup>331</sup> *Id.* The President stated that, despite this determination, the detainees would receive most of the privileges of the Geneva Convention “as a matter of policy.” Some of the privileges denied to the detainees include “a monthly advance of pay, the ability to have and consult personal financial accounts, [and] the ability to receive scientific equipment, medical instruments, or sports outfits.” *Id.* U.S. Dep’t of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), available at [http://www.defenselink.mil/news/jan2002/t01282002\\_t0127sd2.html](http://www.defenselink.mil/news/jan2002/t01282002_t0127sd2.html).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> See discussion *supra* Part IV.B.2.a.

<sup>335</sup> See discussion *supra* Part IV.B.2.a.

contract employees directly participated in hostilities. They would then be characterized as “unlawful combatants” under the standard set out by the United States.

## 2. Tribunals

The United States position toward the Taliban detainees’ legal rights will also affect contract employees. A captured individual, whose status under the law of armed conflict is unclear, is entitled to certain rights. First, upon capture an individual is presumed a prisoner of war.<sup>336</sup> This presumption arises when the person claims the status, appears to have the status, or his Party claims such status for him.<sup>337</sup> If doubt exists as to his status, he is entitled to remain a prisoner of war until a “competent tribunal” determines his status.<sup>338</sup>

The United States never presumed the Taliban to be prisoners of war. Despite the mandatory presumption, the United States unilaterally determined their status. This refusal to recognize the presumption drew criticism from the international community.<sup>339</sup>

---

<sup>336</sup> Protocol I, *supra* note 218, art. 45(1). Article 45 states “[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention . . .” *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* art. 45(1). As Article 45 does not elaborate on the meaning of “any doubt,” it must be assumed that either party can raise the concern, and the concern need not be mutual.

<sup>339</sup> Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475, 479 (2002). A spokesman for the International Committee of the Red Cross, displeased with the United States position, stated “people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.” *Id.* Richard Goldstone, the former United Nations prosecutor for the UN Tribunals for the former Yugoslavia and Rwanda, stated “It is a great misfortune that the most powerful nation in the world and the country that likes to be seen by many as the leader of the free world, turn its back on international law and the protection of civil liberties.” International Judge Praises UN Resolution on Iraq, Warns US, AGENCE FRANCE PRESSE, Nov. 13, 2002.

The United States also refused to convene a tribunal to determine Taliban detainees' status. The United States posited a tribunal was unnecessary because no doubt as to their status existed.<sup>340</sup> The United States reasoned that because it stated publicly that the detainees were unlawful combatants, the legal status was clear.<sup>341</sup>

This position could negatively affect contract employee treatment in similar situations. Following the United States' example, a country could unilaterally determine that contract employees are unlawful combatants and not entitled to a tribunal. In discussing the United States position, Richard Goldstone, a former United Nations' prosecutor, noted "the danger of not respecting international law [is] that it [is] more likely than not [going] to return back to haunt those who violate it."<sup>342</sup> Consequently, contract employees may face prosecution, despite the military's promise that they not "illegal combatants."

### **3. Fourth Geneva Convention**

Another United States policy that may haunt contract employees involves the Fourth Geneva Convention. Under international law, every person captured by the

---

<sup>340</sup> Response of the United States to Request for Precautionary Measures-Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015 (July 2002) [hereinafter U.S. Response]. In March 2002, the Inter-American Commission on Human Rights requested that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal." See Letter from Juan Mendez, President of the Inter-American Commission on Human Rights Request, to Colin Powell, U.S. Secretary of State 4 (March 12, 2002). The Inter-American Commission on Human rights was established by the American Convention of Human Rights to promote and defend human rights. See O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>341</sup> U.S. Response, *supra* note 340, at 1023.

<sup>342</sup> *International Judge Praises UN Resolution on Iraq, Warns US*, AGENCE FRANCE PRESSE, Nov. 13, 2002.

enemy is entitled to some status under international law.<sup>343</sup> A person will either be a prisoner of war under the Third Geneva Convention, a civilian under the Fourth Geneva Convention, or a member of the medical team under the First Geneva Convention.<sup>344</sup> The Fourth Geneva Convention covers individuals who fall outside of these protections.<sup>345</sup>

A contract employee denied prisoner of war status under the Third Convention would be entitled to protection under the Fourth Convention. This convention does not protect the contract employee from prosecution, but ensures he receives certain due process rights.<sup>346</sup>

In its assessment of the Taliban detainees, the United States determined that unlawful enemy combatants are not eligible for the protections of the Fourth Geneva Convention.<sup>347</sup> This allowed the United States to deny the detainees certain fundamental

---

<sup>343</sup> Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW., 29 (July 1994).

<sup>344</sup> *Id.* at 29. The author cites the International Committee of the Red's Cross' commentary, which states that "There is no intermediate status; nobody in enemy hands can be outside the law." *Id.* The Commentary goes on to note that this is the right conclusion "not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view." COMMENTARY, GENEVA IV, *supra* note 289.

<sup>345</sup> See Geneva Convention IV, *supra* note 216, art. 4. "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention [or] a civilian covered by the Fourth Convention." COMMENTARY, GENEVA IV, *supra* note 289, art. 4.

<sup>346</sup> See Geneva Convention IV, *supra* note 216, arts. 71 through 75 (ensuring the right to receive notification of the charges, right to present evidence, right to counsel, and the right to appeal).

<sup>347</sup> U.S. Response, *supra* note 340, at 1021 (July 2002) [hereinafter U.S. Response] (stating that the detainees were not subject to the Fourth Geneva Convention because "they are unlawful enemy combatants who were captured while taking part in hostilities against the United States and its allies.").

due process rights. Unfortunately, this ignores the broad language of the Convention that covers individuals "at any given moment." This language was created to ensure that all cases and situations were covered. The United States ignored the coverage of the Fourth Geneva Convention and concluded that the Taliban detainees were entitled to no protection under the Geneva Conventions. Again, this policy leave contract employees vulnerable to similar treatment by other Parties.

## **E. Recommendations**

### **1. Seek Clarification in International Arena**

DoD must proactively establish the status of all types of contractors. DoD must recognize that not all contractors can be treated the same under international law. Status depends on the nature of the tasks performed and not on the universal label placed on contract employees as "civilians accompanying the force." While some meet that criteria, others clearly do not.

The United States should determine status in coordination with the other Geneva Convention parties. The parties should use an "actual harm" test to determine which tasks cross the line. The final rule should contain objective criteria countries can use to evaluate combatant status. Factors must consider the nature of the task rather than who is performing the task.

DoD must then provide comprehensive, uniform guidance to the military departments. In 2001, Air Force policy deferred lengthy discussion of contractor status because "contractor status under international law cross[es] Service lines and require[s]



further review.”<sup>348</sup> The individual military departments should work with DoD to establish uniform rules that account for the individual needs of each service.

DoD should engage its DoD Law of War Group. The DOD Law of War Group was created to, among other things, “develop and coordinate law of war initiatives and issues . . . and provide advice to the General Counsel . . .”<sup>349</sup> The group consists of lawyers from the Chairman of the Joint Chiefs of Staff, DoD, and each DoD Component.

The DoD Law of War Group should address the difficult issues. Unfortunately, the groups’ earlier attempts to address contractors fell short of being truly effective. According to Army documents from 1999, the DoD Law of War Working Group was working on a joint service law of war manual, in coordination with seven other nations.<sup>350</sup> The participants agreed that civilians accompanying the force would be neither combatants nor combatants.<sup>351</sup> As previously stated, this conclusion is neither helpful nor supported by international law. Instead, the group should focus on establishing factors to be considered in determining whether a particular contract task crosses the line.

## **2. Consider Combatant Status for Contractors**

If contract employees were considered members of the armed forces, they would be combatants and entitled to prisoner of war status. Protocol I defines armed forces as “organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates . . . Such armed forces shall be subject to

---

<sup>348</sup> Air Force Interim Policy Memo, *supra* note 152.

<sup>349</sup> DODD 5100.77, *supra* note 200 ¶ 5.1.2.

<sup>350</sup> Army Memo, *supra* note 299. The working group included lawyers from Australia, Canada, Denmark, Great Britain, New Zealand and the United Kingdom. *Id.*

<sup>351</sup> *Id.*

an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”<sup>352</sup>

DoD has strenuously fought any implication that contract employees are combatants. This effort may truly be in vain. A better choice is to concede that certain contract employees are combatants. They would be covered by the Geneva Conventions and would unquestionably be entitled to prisoner of war status. DoD could then arm the contract employees so that they can effectively protect themselves and others.

DoD can accomplish this task by taking steps to ensure that contract employees meet the definition of “armed forces.” This should be fairly simple, as many already wear uniforms, carry guns, and follow the law of armed conflict. Commanders lack disciplinary control in the traditional sense. Yet, some experts contend that the essential feature of control is that commanders accept responsibility for the actions of their subordinates.<sup>353</sup> In many ways, the military already acts in this fashion.

### 3. **Discontinue the Use of Contractors in Questionable Situations**

If DoD refuses to label contract employees as “combatants,” it should reconsider the manner in which it utilizes battlefield contractors. DoD would benefit tremendously by reclaiming the maintenance and operation services of essential defense systems. If a system is so integral to the mission as to be essential, it is likely that system will produce

---

<sup>352</sup> Protocol I, *supra* note 218, at art. 43(1).

<sup>353</sup> Clarke, *supra* note 226, at 119. For an article advancing the view that civilian contractors should be assimilated into the forces, see Major Brian H. Brady, *Notice Provisions for United States Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?* 147 MIL. L. REV. 1 (1995).

“actual harm” to the enemy. This restructure would also relive many of the concerns regarding the continuation of essential services.

## **V. Conclusion**

Battlefield contractors play an important part in today's military. They can be essential force-multipliers and can free up military personnel for combat-duties. The role of the contractor in today's military will not diminish in the near future. In fact, its role will likely expand. Thus, DoD must face the tough issues.

DoD must proactively address the operational and international issues generated by battlefield contractors. The military departments must operate under uniform guidance that is consistent with international law. DoD must take steps to preserve command and control, as well as ensure the continuation of essential services and military proficiency. DoD must also ensure that contract tasks do not place civilian contractors in positions where they violate international law.

As discussed throughout this article, many avenues exist whereby DoD can attain these goals. DoD must work with the military departments and the international community. If DoD fails to act proactively, it may find itself in extremely undesirable political and diplomatic situations.